

**ENERGY FROM WASTE PLANT AND RAMSAR:
REVIEW OF PLANNING PROCESS**

January 2010

Bioscan Report No.
E1546a/R2FINAL

COMMISSIONED BY
States of Jersey
Environment Scrutiny Panel
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Disclaimer

This Review has been conducted on a completely independent basis. In reaching our conclusions we have drawn upon our knowledge of best practice in environmental impact assessment in combination with documentation and briefings provided to understand the subtleties of the local situation in the States of Jersey. During the Review process and the preparation of this report we have relied upon the accuracy of the underlying information provided to us by States Officers. Where appropriate we have independently sourced additional documentation. Full references and/or source details are provided for independently sourced documentation.

The Review report should be read as a whole.

Opinions, where expressed in this report, are those of the Consultant Team and are not necessarily those of the Client. The Review and this subsequent report have been prepared by Bioscan (UK) Limited with all reasonable skill, care and diligence within the terms of the Contract with the States of Jersey.

While we have taken reasonable precautions to check the accuracy of our analysis, in the context of the time allotted, we explicitly decline any liability for any decisions or actions, taken by the Scrutiny Panel, the States of Jersey or Third Parties, whether direct or indirect, arising out of our analysis or the wider consideration of options. It is for the Client to take this input into account, alongside analysis from other parties, before deciding what, if any, actions or initiatives to pursue. Bioscan (UK) Limited shall not be responsible for the consequences of any such decisions.

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1 EXECUTIVE SUMMARY

1.1 Introduction

1.1.1 This review has not investigated whether an Energy from Waste (EfW) Plant is the appropriate technology for the States to employ as a component within its Solid Waste Strategy or whether La Collette is a suitable location. The review has taken these decisions as a given and has focussed on the technical analysis and processes involved in undertaking an environmental impact assessment of the proposed EfW Plant and in doing so has also assessed on-going environmental issues.

1.1.2 The specific terms of reference for this review are:

- To consider the scope of the Environmental Impact Assessment (EIA) for the new EfW Plant at La Collette and whether this and the related Environmental Impact Statement (ES) were appropriate and fully compliant with relevant standards.
- To establish whether there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Site and adjacent land areas.
- To examine the consultation with stakeholders included in the planning process.
- To consider whether Jersey has fulfilled its international obligations under the Ramsar Convention.
- Any other pertinent matters that may arise during the course of the review.

1.1.3 In excess of 200 different reports and written submissions have been considered during the review and a range of key individuals have been interviewed, both in public hearings and smaller groups.

1.2 Key findings

1.2.1 The scoping process for the EIA for the EfW Plant failed to comply with relevant standards. Considerable ambiguity existed between the project proponent (the Department of Transport and Technical Services (T&TS)) and the regulatory authority (the Department of Planning and Environment (P&E)). This ambiguity should not have existed. The lack of clarity and transparency in the scoping process has had ramifications throughout the subsequent EIA process and has exposed the marine environment to unnecessary potential risks.

1.2.2 The scoping process should have been more inclusive and participative and should have extended to non-statutory consultees including non-governmental organisations and the general public.

1.2.3 The ES failed to provide sufficient information in several key areas, and particularly in relation to the potential impacts on the Ramsar Site, for the regulator, statutory consultees and the general public to consider potential effects from an informed standpoint. P&E raised concerns regarding the evaluation of significant effects within the ES. However, P&E should have applied considerably more rigour during

- the determination process and ensured that all their concerns were adequately addressed by the applicant from an informed standpoint prior to determination.
- 1.2.4 The decision to grant permission placed a disproportionate reliance on post determination mitigation and pollution control measures in order to protect the marine environment. However, the lack of information provided in the ES inherently compromises an understanding of the efficacy of any such measure unless P&E apply a stringent precautionary principle in regulating the site.
- 1.2.5 To assist all parties, contemporaneous guidance should have been published when the Planning & Building (Environmental Impact) Jersey Order 2006 became law.
- 1.2.6 Determination of planning permission was conditional on the provision of a construction environmental management plan in order to protect the environment. The document provided is lacking in detail, based on generic rather than site specific solutions, has not generated a wider dialogue and fails to demonstrably address concerns raised by P&E, including the dewatering of the excavation and the potential for exposing and remobilising contaminated material.
- 1.2.7 The monitoring and reporting protocols associated with managing environmental effects during construction appear to be weak, with poor lines of communication and lacking in co-ordination. Symptomatic of this is the fact that construction activities have commenced and continued on site without resolution of appropriate mitigation measures despite concerns raised in many quarters.
- 1.2.8 Potential environmental risks associated with both the ingress of tidal water and the potential for the site to hold contaminated material were predicted for the construction phase of the project. However, it took more than three months from the date that water ingress was first encountered within the excavation to the production of a detailed method statement to deal with this issue. This is considered unacceptable practice which has unnecessarily exposed the marine environment to a potential pollution risk.
- 1.2.9 The drainage schedule submitted in order to discharge a condition of planning holds limited information with no specific quantification of design values regarding chemical, thermal or volumetric issues. Therefore the suitability of the proposed drainage measures cannot be evaluated. P&E raised issues regarding site drainage but these have not been addressed in the submitted schedule. However, P&E still considered the drainage schedule adequate to discharge the planning condition.
- 1.2.10 The consultation process demonstrated several shortcomings and there appears to be an atmosphere of resignation and mistrust surrounding the EfW Plant which pervades the various non-governmental organisations and the public.
- 1.2.11 A range of consultation fora should have been utilised during the compilation of the ES. Consultation at all stages in the process should have been participative and empowering rather than being seen as a necessary regulatory hurdle to negotiate.
- 1.2.12 Non-governmental organisations should have engaged more actively in raising concerns regarding the submitted ES. By failing to submit formal comments they effectively compromised their right to formally influence the determination process.

- 1.2.13 Article 3.2 of the Ramsar Convention relates to the reporting of change or likely change to the ecological character of listed Ramsar sites. Article 3.2 is unqualified as to the magnitude or significance of change. Ecological character includes any ecosystem component, process and/or ecosystem service.
- 1.2.14 All Ramsar sites should have a management plan. The South East Coast of Jersey Ramsar Site did not possess a management plan at the time of the EIA and, whilst work is in progress, does not currently have a management plan. Without a management plan it is more difficult to assess significant environmental effects and potential changes in ecological character.
- 1.2.15 The resources required to enable proper implementation of the Ramsar Convention have not been forthcoming within Jersey and shortfalls in both the one-off and recurrent costs remain today.
- 1.2.16 Recent studies have indicated that there has been a reduction in environmental quality over the last decade in the portion of the Ramsar Site closest to La Collette. There is evidence that this is the combined result of a decrease in water quality (from point and diffuse discharges), reduced flushing rates due to structural changes and direct human recreational activity. There is an argument that these factors alone (without the EfW development) suggest that an Article 3.2 report should have been submitted to the UK Department of Environment, Food and Rural Affairs (Defra) and the Ramsar Secretariat.
- 1.2.17 The ES was predicated on avoiding impacts to the Ramsar Site. However, the findings of this review consider the ES to potentially be unsound, the mitigation measures inappropriate and poorly considered and the implementation of the construction environmental management plan lacking in rigour. This has resulted in potential pollution of the marine environment. The magnitude of this pollution is not a consideration under Article 3.2. Therefore there is a strong case to argue that an Article 3.2 report should be submitted.
- 1.2.18 Additional studies are required to assess the current status of the Ramsar Site and to implement the site management plan. These studies should be conducted as an independent evaluation and should also address the socio-economic aspects regarding the importance of the site for providing ecosystem service such as the shell fishery.
- 1.2.19 Legitimate environmental concerns remain regarding the South East Coast of Jersey Ramsar Site which need to be investigated, evaluated and addressed. These need to consider issues related not just to the construction and operational phases of the EfW Plant but also wider and more chronic problems including changes in water quality and tidal flushing, invasive plants, recreational pressures and the cumulative impacts of development.

2 INTRODUCTION

2.1 Background to the Scrutiny Review

- 2.1.1 As a result of approving the “Solid Waste Strategy: locations for proposed facilities” the States of Jersey agreed in June 2006 that technologies for the final disposal route for residual waste to replace the existing plant at Bellozanne should be located at La Collette II reclamation site, St Helier. This decision was to be subject to an EIA and planning approval.
- 2.1.2 An outline planning application for an Energy from Waste (EfW) Plant was submitted by T&TS (the “applicant”) on the 9th January 2007 (Planning Application Number PP/2007/0050). Written outline planning permission for the erection of an EfW Plant was granted by the Minister for Planning and Environment on 26th October 2007. Reserved matters were successfully discharged on the 29th October 2008.
- 2.1.3 As of early 2009, the new EfW Plant has been under construction on the existing reclaimed land at La Collette. The site is contiguous with the South East Coast of Jersey Ramsar Site, a wetland area designated as being of international importance under the Ramsar Convention.
- 2.1.4 Since determination a series of concerns have been raised regarding the proposed EfW Plant. These relate to the technical assessment of the potential environmental impacts of the plant, the overall planning and consultation process and the due processes required under the obligations of the Ramsar Convention. These potential concerns have been raised locally by individuals and non-governmental organisations (NGOs) such as Save Our Shoreline and have been passed on to both the Department for Environment, Food and Rural Affairs (Defra) in London and the Ramsar Secretariat in Switzerland.

2.2 General background to Scrutiny

- 2.2.1 Scrutiny is an evidence-based process whose principal function is to hold the Executive to account for its policies and actions. In reviewing Executive policy Scrutiny does not act as a political opposition but seeks to clarify key elements of the policy and its impact on the population through examination of evidence provided by the States of Jersey government departments, stakeholders and the general public.
- 2.2.2 Scrutiny Panels are subject to a strict Code of Practice as adopted by the States in March 2008. This Review has operated under this Code of Practice.

2.3 Terms of Reference

- 2.3.1 The Scrutiny Review into the EfW Plant and Ramsar: Review of Planning Process commenced in early 2009. An advisor, Bioscan (UK) Limited (Bioscan) was appointed on the 13th May 2009. An advisor can be used for a range of tasks

including technical assessment of evidence, advising on the selection and questioning of witnesses and providing briefing papers to the Panel.

2.3.2 The specific terms of reference (ToR) for the advisor on this review are:

ToR1. To consider the scope of the EIA for the new EfW Plant at La Collette and whether this and the related Environmental Impact Statement were appropriate and fully compliant with relevant standards.

ToR2. To establish whether there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Site and adjacent land areas.

ToR3. To examine the consultation with stakeholders included in the planning process.

ToR4. To consider whether Jersey has fulfilled its international obligations under the Ramsar Convention.

ToR5. Any other pertinent matters that may arise during the course of the review.

2.4 Our credentials

2.4.1 Bioscan was formally appointed on the 13th May 2009 to act as the independent advisor to assist the formal review process under the ToR described above. The role of Bioscan in this process is:

- to apply specialist knowledge to the review in order to assist the Panel in assessing the evidence presented to it; and
- to advise the Panel on further research it might undertake to develop a broad understanding of the issues involved.

2.4.2 Bioscan have provided independent and impartial professional analysis of the evidence received by the Panel in the course of this Review and have assisted in directing the Panel's research of matters falling within its terms of reference. Specific responsibilities adopted include the following:

- studying documentation provided by the Scrutiny Office and any written submissions from stakeholders and members of the public and providing a written critical independent analysis of the same;
- assisting the Panel in drawing conclusions from the evidence received;
- providing in a timely manner a written critical independent analysis of the same;
- briefing the Panel in advance of public hearing sessions with Ministers, Officers and with local stakeholders on key issues arising from the evidence submitted;
- assisting, as required by the Panel, with the preparation of a question plan for the public hearing sessions;
- attending public hearing sessions and thereafter to discuss with the Panel, as appropriate, on the oral evidence received; and
- advising on the preparation of the Panel's report and any recommendations arising from the review.

2.4.3 In the course of this review Bioscan have also utilised the services of the following specialists to provide specific input to the process:

- Dave Pritchard, Independent Consultant; and
- wca environment.

- 2.4.4 Bioscan has been operating as an independent environmental consultancy since 1984. The company provides a highly regarded ecological advice and solution finding service to commercial clients and also maintains an active part in research and Government body work which underpins the expertise offered. Bioscan carry out ecological evaluations and impact assessments for a range of private and public sector clients, including the residential sector, retail developments, minerals operators, utility companies, local authorities and statutory Government advisors. Involvement is at all stages from site selection through protected species licensing work to performing a supporting role for planning applications and contributing to or co-ordinating Environmental Statements. Bioscan's principal staff appear regularly as expert witnesses at both project-specific and development plan inquiries. In 1991 Bioscan were accredited as one of the first five Registered Members of the Institute of Environmental Assessment (now the IEMA). Accreditation was renewed in 2001 and continues to present. Bioscan staff have specific experience of working in Jersey on nature conservation, development and planning projects.
- 2.4.5 Rob McInnes of Bioscan, the lead advisor to the panel, has strong links with the Ramsar Convention going back several years. Rob has represented the Society of Wetland Scientists on the Ramsar Scientific and Technical Review Panel (STRP) since 2005. Rob has undertaken work on behalf of the Ramsar Secretariat including advising on impacts to a Ramsar site in Chile, inputting into several STRP workstreams and being appointed Task Leader for Urban and peri-urban wetlands. Prior to joining Bioscan, Rob was Head of Wetland Conservation at a UK-based NGO, the Wildfowl & Wetlands Trust (WWT), where he was responsible for the development, co-ordination and implementation of WWT's strategic wetland conservation work. Before becoming Head of Wetland Conservation, Rob was Managing Director of WWT's specialist ecological consultancy, WWT Consulting where he was responsible for the delivery of a range of wetland projects across the world. Rob has published extensively on a range of wetland issues in both the peer-reviewed and populist literature.
- 2.4.6 Rob has held several strategic roles including being President of the European Chapter of the Society of Wetland Scientists (SWS) from 2005-08, representing SWS on the Ramsar Convention's Scientific and Technical Review Panel (2005 to present), sitting on the Technical Advisory Group of the England Wetland Vision (2006-2008) and representing WWT on the Natura 2000/Ramsar Forum.
- 2.4.7 Dave Pritchard is an independent consultant. Originally trained as an ecologist, he has worked for 25 years in national and international policy and law with bodies including the Ramsar Convention, Biodiversity Convention, Foundation for International Environmental Law & Development and UNESCO, and has been a non-executive Director of both Wetlands International and the UK Government's Joint Nature Conservation Committee, where he currently chairs its Audit & Risk Management Committee. Dave has for many years been a leading figure on numerous environmental bodies and working groups (including the Millennium Ecosystem Assessment), has published prolifically on wetlands conservation, planning policy and cultural heritage, pioneered successful global policy initiatives

on environmental impact assessment, and undertaken expert advisory missions worldwide (including involvements in the UK Overseas Territories and Crown Dependencies).

- 2.4.8 As one of the longest-serving members of the Ramsar Convention's STRP, he currently chairs its working group on assessment, monitoring and reporting, and has originated much of the Convention's technical guidance on these subjects. In 2008 he was awarded the Wetland Conservation Award by the Ramsar Convention on Wetlands. Previous positions include leading BirdLife International's wetlands work, and building up and heading teams in the UK's Royal Society for the Protection of Birds (RSPB) covering planning policy, protected areas policy and EIA. He was also responsible for the RSPB's several hundred casework involvements each year, including public inquiry advocacy and participation in the UK and European court systems. Dave also chairs the UK Arts & Environment Network and serves on two international working groups on cultural and spiritual values of the natural world.
- 2.4.9 wca environment limited is an independent research and consultancy company established in 2005 by highly experienced chemical risk assessors. It provides assistance to industry and governmental agencies in the field of environmental toxicology and risk assessment. wca environment are expert in preparing chemical risk assessments under Registration, Evaluation, Authorisation and restriction of Chemicals (REACH); in the derivation of Environmental Quality Standards and Limit Values for substances in waters, soils, sediments and wastes; and in producing hazard and exposure assessments for active substances in pesticides, biocides and human and veterinary medicines.
- 2.4.10 wca environment currently consists of 18 experienced professionals holding advanced degrees in many areas including toxicology, biochemistry, hydrobiology, environmental technology and statistics. wca environment is accredited to ISO 9001 and also operates an Environmental Management System accredited to ISO 14001.
- 2.4.11 Bioscan, Dave Pritchard and wca environment are all completely independent.

2.5 Scope of this report

- 2.5.1 It has not been the role of Bioscan to investigate whether an EfW Plant is the appropriate technology for the States to employ as a component within its Solid Waste Strategy or whether La Collette is a suitable location. For the purpose of this review it has taken these decisions as a given and has focussed on the technical analysis and processes involved in undertaking an environmental impact assessment of the proposed EfW Plant.
- 2.5.2 The review process has assessed in excess of 200 different reports and written submissions and interviewed, both in public hearings and smaller groups, numerous individuals. Throughout this process many minor issues have been highlighted which are not necessarily covered in detail in this report. The report focuses on the key issues identified during the review which are germane to the ToR and will contribute to improved environmental protection in the future.

2.5.3 Although this document interprets matters of a legal and constitutional nature, it comprises an assessment by a commissioned professional expert and does not constitute a formal legal opinion.

2.6 Structure of the report

2.6.1 In conducting the review Bioscan have undertaken site visits, interviewed relevant stakeholders, attended public hearings, examined documented evidence and applied expert knowledge. Many of the aspects of the ToR are ultimately cross-cutting and relate to process issues (such as consultation, documentation and communication) and technical evaluation. In order to capture the salient issues and to satisfy the ToR the report adopts the following structure:

- Introduction
- Assessing the scope of the EIA process
- On-going environmental concerns
- The consultation process
- Obligations under the Ramsar Convention
- Ancillary matters

2.6.2 Under each section evidence is reviewed and presented and key findings are summarised. Where possible recommendations are made to assist in improving processes or understanding relevant issues. Where improvements have been made since the EIA process for the EfW Plant commenced these are highlighted.

3 SCOPE OF EIA AND APPLICATION OF RELEVANT STANDARDS

3.1 Terms of reference

3.1.1 The following ToR is considered in this section:

To consider the scope of the EIA for the new EfW Plant at La Collette and whether this and the related Environmental Impact Statement were appropriate and fully compliant with relevant standards.

3.1.2 In order to evaluate the scope of the EIA process and the quality of the subsequent environmental statement (ES) it is necessary to first understand the relevant standards and working practices which apply. The standards used in this review have been drawn from both the States of Jersey and wider best practice in undertaking EIA in the UK. Where relevant, recent case law has been referenced to provide an insight into compliance with EIA legislation. This is primarily drawn from the UK regulations derived from the EC Directive 85/337/EEC as amended by EC Directive 97/11/EC.

3.2 Baseline EIA standards

3.2.1 Any EIA will be bound by the prevailing statutory legal framework and associated policy and guidance, usually published by a government agency. At the time of submitting the ES (January 2007) the legal context was provided by the Planning & Building (Environmental Impact) Jersey Order 2006, the policy requirements by the Jersey Island Plan 2002, Policy G5: Environmental Impact Assessment and the published guidance was provided by the Environmental Impact Assessment – Environmental Policy Advice Note 1.

3.2.2 In addition to the above, several other standards for EIA are cited in the ES including:

- Several EC Directives; and
- Guidelines for Baseline Ecological Assessment produced by the Institute of Environmental Assessment in 1995.

3.2.3 In the context of this review it also appropriate to consider other relevant standards widely applied within the UK. These include:

- EC Directive 85/337/EEC as amended by EC Directive 97/11/EC ‘Assessment of effects of certain public and private projects on the environment’;
- The Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008;
- UK Department for Communities and Local Government – Environmental impact assessment: guide to procedures 2000;
- Institute of Environmental Management and Assessment (IEMA) – Guidelines for Environmental Impact Assessment, 2004;
- Institute of Ecology and Environmental Management (IEEM) – Guidelines for Ecological Impact Assessment in the UK, 2006; and

- Other UK guidance and planning policy statements.

3.3 Assessment of compliance

3.3.1 Environmental impact assessment should be a systematic process to identify, predict and evaluate the environmental effects of proposed actions and projects. There are several stages in the process: screening, scoping and EIA compilation / ES production. There are also subsequent planning stages beyond the EIA process *per se* which include review, determination, and reserved matters. Each stage in the EIA and planning process for the EfW Plant is considered.

Screening

3.3.2 The screening process determines whether the development proposal requires an EIA. Under Article 2 of the Planning & Building (Environmental Impact) Jersey Order 2006 it was clear that the proposed EfW Plant required an EIA. This was accepted by all parties concerned and no issues were identified during this review regarding the screening process.

Scoping

3.3.3 Scoping is the process for determining the range of information that is likely to be required in an EIA. It also ensures that an EIA focuses on the important issues and avoids those that are considered to be insignificant. This helps to ensure that EIA is a cost efficient process¹.

3.3.4 Article 4 of the Planning & Building (Environmental Impact) Jersey Order 2006 states that a person may request the Minister to indicate the information to be provided in an ES (the scope). However, there is no legal requirement of the regulator P&E to request or insist that scoping is undertaken, or similarly for the applicant T&TS to undertake scoping.

3.3.5 The scoping exercise should identify which environmental effects are likely to be significant and eliminate those which are considered insignificant. The ES should consider further the degree to which these effects are significant. The scoping process should assess the environmental receptors² for which there would be no likelihood of a significant effect. These need not be subject to further evaluation within the ES.

3.3.6 Significance should take into account a range of criteria including the value of the receptor (at a spatial scale, e.g. international, national, regional, etc), the magnitude and duration of the effect, the reversibility of the effect and the sensitivity of the receptor. Scoping should be transparent and consistent, based on a systematic approach with a reasoned justification as to why certain issues are excluded from the ES. Often this process is based on a combination of baseline data and expert judgement.

¹ IEMA (2004). Guidelines for Environmental Impact Assessment. Institute of Environmental Management and Assessment (IEMA), Lincoln, UK.

² A receptor is defined as a component of the natural, created or built environment that can be affected by an impact.

- 3.3.7 Whilst not a legal requirement, recent best practice recommends that the scoping process should be a participative one¹. This view is supported by the advice in the Environmental Impact Assessment – Environmental Policy Advice Note 1 produced by the States of Jersey Planning & Environment Committee. Such an approach assists in building confidence among concerned organisations and the public that environmental issues are being dealt with in a fair and comprehensive manner.
- 3.3.8 This review suggests that the scoping process failed to comply with relevant standards. The following issues have been identified:
- P&E are very clear that ‘pre-scoping’ took place and that T&TS did not return with a request for a full scoping opinion. Therefore the formal scope of the ES was not agreed by P&E. However, it is clearly the opinion of T&TS that the scope was agreed as stated in the ES (para. 3.2.1). Despite subsequent claims raised during the review process, this statement does not appear to have been contested by P&E at the time of submission of the ES or during the determination process.
 - The absence of an agreed formal scope in itself is not necessarily crucial as this is not a statutory obligation. The pre-scoping process identified a range of environmental issues for T&TS to consider and P&E retained the responsibility to request further information at subsequent stages in the EIA process. However, for a development of this magnitude, it would be expected that there should be clarity regarding whether the scope of the ES has been formally agreed and ambiguity should not remain.
 - The pre-scoping process involved numerous consultations between the two Departments. However, the reporting of this process is not transparent and hence the ambiguity remains. The terms ‘scope out’ and ‘scoped out’ appear on the notes of meetings between the Departments but there is no consistent interpretation of these terms across the Departments. T&TS took these terms to mean that the issue was not to be addressed in the ES. P&E have stated that these terms could be interpreted to mean that the full scope of the EIA requirements relating to the issue would be scoped out subsequently. This is the case with regard to the assessment of potential impacts on the marine environment. Such ambiguity should not exist in a transparent and systematic process.
 - There has been a lack of transparency or systematic approach to assessing the significance of effects during the scoping phase. The notes of the scoping exercise which P&E provided to T&TS to confirm ‘the scope of the Environmental Impact Assessment’ indicate that the effects of the development on coastal waters and groundwaters have been considered as not being of significance and are described as ‘scope out’ or ‘scoped out’. Similarly, flora and fauna are described as ‘scoped out’. A range of assessments and evaluations are recommended for several issues. However, under ‘Biodiversity’ the only consideration given to the adjacent Ramsar Site is ‘cooling water plume statement’. No further systematic evaluation or reporting is provided to justify the scoping decisions in respect of these receptors.
 - Best practice and available planning advice at the time of scoping recommends that the scoping process should be participative. Whilst numerous meetings were held, several with key statutory consultees and members of P&E, a wider, inclusive approach does not seem to have been achieved. The detail of

consultee meetings presented in the ES does not include any non-governmental organisations (NGOs) or broader public engagement during the scoping process (this is discussed further in Section 5 of this report).

Environmental Statement

- 3.3.9 The purpose of an ES is to identify, describe and evaluate the likely significant effects on the environment of the proposed development or project. Schedule 2, Article 1 of the Planning & Building (Environmental Impact) Jersey Order 2006 states very clearly what an ES should contain. The adequacy of an ES is a matter for the competent authority, in this case P&E, to determine³. Should P&E feel that the ES fails to comply with the Planning & Building (Environmental Impact) Jersey Order 2006, and hence in principle the approach described in the EC Directive 85/337/EEC (as amended), it should be returned by the competent authority to the applicant.
- 3.3.10 Environmental receptors which have been considered at the scoping stage as not likely to be significantly affected by the development do not have to be considered within an ES. Whilst the style and content of individual ESs will vary, the following components would normally be required: baseline information, project description, prediction of impacts, details of mitigation and a non-technical summary of the components.
- 3.3.11 Despite the applicant (T&TS) being a government department with attendant public obligations it is unreasonable to expect any applicant to provide more than the minimum information required to satisfy the regulating authority. In the case of a government department conducting and submitting an ES this could be interpreted as being prudent fiscal management. Therefore any weaknesses or shortcomings within an ES considered adequate for determining the outcome of an application are ultimately the responsibility of the regulator (P&E).
- 3.3.12 This review has identified the following issues relating to the assessment of impacts and the content of the ES:
- The philosophy underpinning the evaluation of likely significant effects on the marine environment, and particularly the Ramsar Site, during both construction and operation, appears to have been to show that there would be no impact because appropriate mitigation measures would be employed to annul significant effects. However, for this philosophy to be successfully implemented it must be predicated on:
 - Provision of sufficient information on the nature and significance of potential impact sources in the absence of mitigation for the regulator, statutory consultees and members of the public to consider those effects;
 - Confidence in the successful design, implementation and management of the mitigation measures.
 - A list of reports and data sources is provided regarding baseline surveys conducted on the Ramsar Site (para.10.2.1). However, none of the information contained within these documents is presented, discussed or referred to in any assessment of significant effects. Furthermore, these data sources pre-date

³ *Regina v Rochdale MBC ex parte Milne* [2001] ENV LR 406

submission by between five and eighteen years and no assessment of their pedigree or relevance to the prevailing baseline is provided. This review concludes that there is insufficient baseline information provided to enable the regulator, any statutory consultee or members of the public to consider environmental effects on the Ramsar Site from an adequately informed standpoint. The subsequent suggestion raised by T&TS in public hearings is that the regulator held sufficient knowledge of the Ramsar Site to facilitate the evaluation of significant effects. However, this does not obviate the need to provide an appropriate baseline within the ES so that other interested parties can consider the outcomes.

- The following potential impacts on the Ramsar Site are identified in the ES:
 - water pollution risk from the construction and operation of the new facility (para. 1.4.4);
 - discharge from cooling waters (para. 10.3.2);
 - the possibility that potentially harmful substances may be present in the made ground is also highlighted (para. 11.4.2) along with the direct connectivity with the marine environment (para. 16.3.2); and
 - the potential for run-off from hardstanding to generate contamination (para. 16.6.2).
- The following potential impacts on the Ramsar Site are also recorded in the environmental impact summary tables (para. 17.1):
 - impact of flue gas emissions;
 - impact of thermal heated discharge from the proposed EfW facility to coastal waters;
 - potential spillage risk during construction;
 - release of contaminants from made ground;
 - leachate generation during waste handling;
 - contaminated drainage reaching ground and coastal waters; and
 - spillage risk from site chemicals.
- However, in the Biodiversity chapter of the ES (para. 10.3.2) it states that ‘the only potential impact on the Ramsar Site would be water pollution risk from the construction and operation of the new facility’. For all of these potential impacts there is no detailed or systematic assessment of significance, with the Ramsar Site being considered as a homogeneous entity and not the sum of its features of international significance or noteworthy flora and fauna. T&TS have suggested that there was no need to provide this assessment as P&E possess a sufficient understanding of the receptor and the significance of adverse effects.
- A source-pathway-receptor analysis is provided for water vectored sources of pollution during construction (para. 16.3.1). This is an appropriate forecasting approach for assessing risk. The potential source identified is contamination within the made ground. The pathways are infiltration and tidal movements. The main receptor is the Ramsar Site. Therefore a likely significant effect has been identified. However, there is a reliance on post determination monitoring to inform consenting and pollution control measures. There is a lack of detail provided on the nature of potential contamination and a lack of clarity regarding the rates and magnitude of the pathways. The environmental impact summary tables (para. 17.1) define the actual impact and proposed mitigation as “anticipated to be low risk due to inert nature of fill”. This is despite the fact that P&E raised the specific issue that the site contains buried incinerator ash and other non inert waste streams in their response to post submission

consultation. There is precedent in UK planning law to consider a permission unsound if there is insufficient information for all parties, including the public, to consider the environmental effects (Appendix 1). Given the significance of the receptor (an internationally protected site) and the potential variability of the identified contamination source this review has concluded that further information should have been provided in the ES in the source-pathway-receptor model to facilitate better determination of the likely significant effect, and hence the design of mitigation measures.

- The reliance on the use of mitigation measures, such as pollution control procedures, which are contingent on further ground investigations may not be compatible with the principles held within the EC Directive 85/337/EEC as amended and therefore in the Planning & Building (Environmental Impact) Jersey Order 2006. Deferring the description of a likely significant effect until after the decision to grant permission to the development concerned, and consequently deferring the measures to mitigate it, would be in conflict with the Directive's objectives in terms of enabling members of the public and other consultation bodies to contribute to the environmental information.
- There is no assessment of either construction or operational impacts regarding air quality implications for the Ramsar Site. Whilst the overall assessment of air quality is relatively robust regarding impacts on human receptors, there is no assessment of the likely significant effects on the marine environment. In an ES produced by Bابتie Fichtner for a similar EfW Plant in Nottinghamshire, it was considered necessary to assess the potential effects of emissions on protected nature conservation sites⁴. Whilst the overall assessment of operational air quality for the proposed EfW Plant at La Collette shows a positive impact the likelihood of any significant effect of emissions on the adjacent protected site is not presented. The need to consider airborne emissions is identified under 'Biodiversity' in the notes supporting the agreed scope of the ES. The Planning & Building (Environmental Impact) Jersey Order 2006 clearly states that both positive and negative effects of the development should be covered in the ES. If the overall improvement in air quality was considered to produce a positive effect then information supporting this conclusion should have been presented. However, it is not possible to directly draw this conclusion as the evidence has not been presented within the ES.
- A clear potential impact on the Ramsar Site is identified from the discharge of cooling water. This was also highlighted in the agreed scope of the ES. Repeated reference is made in the ES to the 'existing outfall consent'. However the details of this consent are not provided and its repeated use as an assumed baseline condition is considered by this review as disingenuous. No baseline data or proposed thermal values are presented. Therefore there is insufficient information presented in the ES to assess the likelihood of significant environmental effects from the potential impact source.
- The presence of the existing cooling water culvert has not been considered as a potential pathway for the conveyance of sea water or for the preferential transfer of water between the construction site and the marine environment. The culvert has been built to normal appropriate standards and is set on material of higher hydraulic conductivity to the surrounding made ground. This makes it a

⁴ Eastcroft Energy from Waste Plant: Third Line Extension. Environmental Statement Volume 1: Main Statement. <http://www.wrg.co.uk/eastcroft/data/downloads/general/Environmental%20Statement%20July%202005.pdf>

preferential flow path for water. Changes in ground conditions in the vicinity of the culvert should have been assessed as part of the evaluation of potential impacts on the marine environment. This assessment is completely absent and has not been considered in the ES.

- In undertaking the EIA T&TS will have done the minimum required to satisfy the regulator. This is acceptable practice. From evidence presented, it is clear that T&TS held the position that it was for the regulator to use data they held on the construction activities associated with previous civil engineering projects contiguous to the Ramsar Site as a baseline for the EIA. The assumption was that it was the responsibility of the regulator to use their knowledge to determine the level of information required to be within the ES. This knowledge of other projects conducted adjacent to the Ramsar Site could then be applied in order to evaluate the likely significant environmental effects associated with the construction of the EfW facility. This is a fundamentally flawed premise. The ES should include a description of the likely significant effects of the proposed development on the environment. Whilst the ES can draw upon local knowledge as part of the baseline it cannot rely simply on knowledge of similar developments in the locality as an important determinant. The local analogies must be supported by an evaluation of site-specific baseline data. The evidence from similar local sites should be assessed in relation to the development site, however no evidence of the local comparators is provided in the ES. It is assumed that the approach proposed by T&TS was followed by P&E at the scoping stage allowing them to conclude that further evaluation of likely significant effects during construction was not required.
- The conclusion within the ES that no likely significant effects on the marine environment were predicted, during either construction or operation, removes the need to examine cumulative effects on the Ramsar Site. Any potential inadequacies in one area of the ES are therefore compounded.
- The presence of the ash pits within the red line of the application site is considered in Appendix 8 of the ES. The ES states that the ash mounds contain contaminated material and that the area should be avoided. The ash mounds are therefore a source of potential risk in a source-pathway-receptor model. However, they are not considered in any part of the assessment of environmental effects. This is considered appropriate if the approach proposed is one of avoidance, and hence no proposed change in environmental conditions. However, if construction activities were proposed within the area of, or immediately adjacent to, the ash pits then the likely significant environmental effects of this should have been assessed. If unforeseen construction activities have arisen since the submission of the ES then P&E should have been engaged by T&TS, or their agent, prior to works commencing. This does not seem to have been the case with regard to the damage to the ash pit liner in March 2009.
- Information provided with regard to pollution control during both construction and operation is limited. P&E identified some of these shortcomings in their compilation of consultation responses in response to the checklist for environmental impact assessment. Within the ES there is an overly heavy reliance on pollution control measures and guidance to be regulated by P&E. The absence of a robust baseline makes the design, implementation and management of pollution control and mitigation measures problematic, and their success impossible to measure. This review considers that the underlying philosophy advocated in the ES appears to be one of dependence on appropriate

regulation and mitigation post determination rather than evaluating the likely significant effects in order to inform determination. Not only is this approach inconsistent with the relevant standards required within Jersey, it also shifts the burden of responsibility from the applicant to the regulator, if the regulator deems that the ES holds sufficient information to evaluate the appropriateness of mitigation and to consent to pollution control measures.

- The ES was considered by P&E to be fully compliant with relevant standards and not deficient in any way. Hence it is the position of P&E that it contained sufficient information for both determination and consenting and regulating mitigation measures, despite the fact that specific requests for additional information were not addressed in the final ES. Given the issues identified above, this review suggests that there are significant grounds to consider this position unsound and to consider the ES non-compliant with relevant standards.

Determination and Reserved Matters

- 3.3.13 EIA is an iterative process. In the case of the EfW Plant there is a record that the regulator (P&E) and the applicant (T&TS) operated in a flexible and co-operative manner. The approach advocated by P&E in May 2006, which proposed that the scope of the EIA could evolve as the process develops, is considered appropriate and sound. One of the key stages in the overall process is post submission of the application and the accompanying ES.
- 3.3.14 Following an internal review, if P&E felt that the ES failed to assess significant environmental effects or was in any way deficient it could be returned to the applicant with a request for further information. This indeed happened. Post-submission consultation responses were sent by P&E to T&TS in May 2007. T&TS responded to these and returned their subsequent comments to P&E in September 2007. The additional information received by the regulator enabled the application to be determined subject to compliance with conditions and approved plans. The assumption therefore is that the responses provided by T&TS were sufficient to satisfy the requirements of the Planning & Building (Environmental Impact) Jersey Order 2006.
- 3.3.15 The granting of permission was subject to ‘Reserved Matters’. The Reserved Matters were approved by P&E in October 2008.
- 3.3.16 The following key issues have been identified during the determination process and in discharging the Reserved Matters:
- Some of the issues highlighted by this review regarding the content of the ES were also identified by P&E during the post submission consultation process. The internal departmental process itself seems to have been robust and comprehensive in seeking information on the key issues, significant effects or areas of concern. However, many of the responses received from members of P&E staff, and especially those pertaining to waste regulation and water pollution, are weak and do not request sufficient clarity in order to address the concerns raised above regarding the ability to assess likely significant effects. For instance, P&E highlight the presence of buried incinerator ash and other inert waste streams but do not suggest any further assessment or improved level of understanding regarding the likely significant environmental effects of such

materials. Similarly, the risk to the marine environment from surface waters during construction and operation is highlighted by the statement ‘if any of the surface water drainage on and around the site discharges directly to the sea this should be considered as a pathway and suitable mitigation measures taken to avoid pollution’. However, there is no suggestion that the significance of the effect is investigated, rather the adoption of mitigation is recommended without understanding fully the significance of the effect.

- T&TS responded to the representations made by P&E. Their representations were considered by P&E to be sufficient to enable determination. Therefore the response to the fact that the site was known to include non-inert waste was to provide the following comment:
 - ‘Noted. We recognise that the La Collette reclamation site does contain buried incinerator ash and other non-inert waste including some occasional asbestos.’
- This is considered to be an inadequate response as it does not provide any additional information regarding the evaluation of significant effects or the appropriateness of mitigation measures. Consequently further information should have been requested by P&E in order to provide sufficient guarantees that the environment would be protected.
- Similarly, in response to the need to provide more detail on the exact methods proposed for dewatering, the following response was provided by T&TS:
 - ‘Construction Industry Research and Information Association (CIRIA) publication ‘Groundwater Control, Design and Practice’ CIRIA Report No. C515.’
- The response provided by T&TS regarding dewatering simply repeats para. 16.3.2 of the ES and does not provide any new site specific information. Therefore no additional information was available to P&E to determine likely significant effects or the appropriateness of mitigation measures despite having formally requested more information. Therefore the approach taken by P&E demonstrably failed to address their own concerns. The lack of information provided in the ES inherently compromises the efficacy of any pollution control or mitigation measure unless P&E apply a stringent precautionary principle in regulating the site. This was not done. The lack of rigour demonstrated by P&E in ensuring that appropriate and feasible dewatering methodologies were determined prior to the commencement of construction is considered by this review as a significant failure of the EIA process.
- During the determination of the Reserved Matters the Minister for Transport and Technical Services stated in a letter to the Minister for Planning and Environment that “it is therefore imperative for the success of the Energy from Waste Project that the Reserved Matters be determined at your public meeting proposed for Friday 24th October”. The justification provided related to potential additional costs associated with delays in the process and the fact that “as a Council of Ministers we have to have regards to the wider interest of the Island”. However, one of the objectives of EC Directive 85/337/EEC is the protection of both the environment and the quality of life of individuals, which are also part of the wider interest of the Island. Potentially the representation from the Minister for Transport and Technical Services could be interpreted as political pressure being applied to the determination process.

3.4 Conclusions and recommendations

3.4.1 The question posed in the ToR was to consider whether the scope of the EIA and the associated ES were appropriate and fully compliant with relevant standards. The relevant standards used to consider this ToR extend beyond the wording of the Planning & Building (Environmental Impact) Jersey Order 2006 and the limited guidance provided in Environmental Policy Advice Note 1. Whilst this might seem inappropriate to some parties, this approach has been applied on the following basis:

- Whilst it is acknowledged that the threshold for what may be considered an impact on the environment in a local Jersey context will be different to that in the UK or elsewhere, the Planning & Building (Environmental Impact) Jersey Order 2006 is based on the adoption in principle of the approach described in EC Directive 85/337/EEC (as amended). Therefore, without the luxury of the precedents sets by planning case law or by similar local large-scale infrastructure projects it has been necessary to cast the net of comparison with relevant standards wider than the States of Jersey.
- When the Planning & Building (Environmental Impact) Jersey Order 2006 became law no substantive supplementary planning guidance was issued to explain development control considerations or to provide guidance to statutory agencies or the general public. This is considered a significant flaw as all parties concerned were operating in a partial planning vacuum.

3.4.2 This review has concluded that there are several areas where the EIA process and the subsequent ES fail to comply with the considered relevant standards. The key findings are summarised below:

Key Findings

- The screening process was competent and adequate.
- The scoping process failed to comply with relevant standards.
- Given the magnitude of the development and the potential environmental issues, T&TS should have formally requested a scoping opinion from the Minister.
- P&E should have been clear and unambiguous in their recommendations regarding the required scope of assessments and evaluations. Record keeping of these recommendations should have been more robust.
- Both P&E and T&TS should have ensured that decisions made during the scoping phase were systematic, transparent, unambiguous and formally recorded.
- Decisions made at the scoping stage have had ramifications throughout the subsequent EIA process. This has undermined the assessment of likely significant environmental effects.
- Scoping should have been more participative especially in terms of engaging with NGOs and the wider public.

- T&TS have based the EIA on the premise that there should not be an impact on the Ramsar Site and that they would ensure that there was not an impact on the Ramsar Site. Whilst this is a laudable approach, the ES has failed to provide sufficient information in several key areas, and particularly in relation to the Ramsar Site, for this position to be guaranteed or for the regulator, statutory consultees and the general public to consider potential effects from an informed standpoint. P&E should have applied considerably more rigour during the determination process.
- The internal post submission review process within P&E was adequate to garner a collective view of the ES. However, both the technical review of the ES, and especially the evaluation of significant effects, and the reaction to the subsequent responses provided by T&TS lacked considerable rigour and exposed several shortcomings across the department.
- The decision to grant permission placed a disproportionate reliance on post determination mitigation and pollution control measures in order to protect the marine environment and specifically the Ramsar Site. However, the lack of information provided in the ES inherently compromises an understanding of the efficacy of any such measure unless P&E applied a stringent precautionary principle in regulating the site. The key areas which lacked rigour include:
 - The very limited approach to describing the potential environmental effects of contamination in the made ground and the impact on the marine environment due to ingress of seawater.
 - Lack of detail requested on the proposed methods for dewatering during construction, including *inter alia* the volume of water to be removed, the potential levels of contamination in both water and settled silt, the impact of removing any water from site and how the marine environment would be protected.
 - The failure to identify the adjacent ash pit as a source of contamination and the lack of a clear method statement as to how this area would be protected to avoid possible environmental impacts.
 - The failure to identify the culvert as a preferential flow pathway and hence to propose appropriate mitigation or environmental protection.
- The result of the lack of rigour applied within both the drafting of the ES and the subsequent approach of the regulator to information shortcomings and lack of knowledge has exposed the environment to unnecessary risks.
- Repeatedly throughout this review the term ‘comfortable’ has been used to describe the relationship between the two departments. Whilst this brings with it positives, it can also undermine the procedural process of EIA and potentially result in complacency. There is evidence to suggest that this has happened especially with regard to understanding the likelihood of significant environmental effects from potential contamination within the made ground.
- Contemporaneous guidance should have been published when the Planning & Building (Environmental Impact) Jersey Order 2006 became law. In the absence of guidance a precautionary approach should have been adopted by the regulator. The failure to adopt a precautionary approach and to apply sufficient rigour to the regulation of development must not be allowed to set a legal precedent for future developments requiring an EIA in the States of Jersey.

3.4.3 The following recommendations are made:

Recommendations

- Guidance should be published on the EIA process in Jersey. This review is aware that this is the current intention of P&E and such guidance is imminent.
- There must be a more systematic and transparent process applied during scoping. This needs to record how and why decisions have been made.
- Scoping needs to be more participative, especially beyond government departments.
- Each project needs to be assessed on its own merit. Whilst analogies can be drawn from local knowledge this does not obviate the need to conduct site-specific studies and evaluations.

4 ON-GOING ENVIRONMENTAL CONCERNS

4.1 Terms of reference

4.1.1 The following ToR is considered in this section:

To establish whether there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Site and adjacent land areas.

4.1.2 The scrutiny review has accessed a considerable volume of information germane to an assessment of the EIA process and also to comprehending environmental issues relating to possible impacts of the EfW Plant on the Ramsar Site and adjacent land areas.

4.1.3 On-going environmental concerns are discussed in relation to two stages in the process: during construction; and during operation of the EfW Plant.

4.2 Environmental concerns during construction

4.2.1 The evaluation of the EIA process in Section 3 of this report has highlighted several on-going issues and environmental concerns relating to the construction phase of the project. Whilst many of these issues could be considered as ‘procedural’ there is the potential for a failure of procedure to manifest itself as an actual negative environmental effect.

4.2.2 Planning permission was granted subject to compliance with a condition to submit a Construction Environmental Plan (CEMP). The Reserved Matters submission included a Construction Management Plan. Annex 1 of this document comprised the CEMP (document dated 21st October 2008). As discussed in Section 3 of this report, the ES, and subsequent decision to grant planning permission, placed considerable reliance on post determination mitigation and pollution control measures to protect the marine environment during the construction works. Therefore the pedigree and utility of the CEMP is paramount if negative environmental effects are to be minimised.

4.2.3 The CEMP was considered acceptable by P&E and signed off on the 29th October 2008. There were no further conditions attached to the CEMP and therefore the document can be considered to be robust in the eyes of the regulator and appropriate to ensure negative environmental impacts are minimised.

4.2.4 A good CEMP should detail all the project specific mitigation measures required to ensure the environmental impact of a project is minimised⁵. For a CEMP to be successful it is important that the ES contains the essential information on potential impacts and proposed mitigation. The core of the CEMP should detail site specific environmental actions to be adhered to / implemented pre-construction, during construction and post-construction. Best practice guidance⁵ on the preparation of

⁵ IEMA. 2008. Environmental Management Plans. Best Practice Series, Vol. 12. IEMA, Lincoln, UK.

CEMPs states that it is important that individual actions are clearly defined in terms of:

- What should be done;
- How it should be done;
- Why should it be done;
- Who should do it; and
- A section to allow verification that the action was completed.

4.2.5 It is also recommended that to be successful the CEMP should involve a number of parties during its implementation. Typically this will involve the project proponent (the applicant, in this case T&TS), the principal consultants (in this case Babbie Fichtner), an appointed environmental co-ordinator or manager, a site clerk of works, construction operators (in this case SBC Ltd and all their sub-contractors), the regulator (P&E) and wider stakeholders.

4.2.6 The following key issues have been identified with regard to the CEMP provided by the applicant and accepted by the regulator as being adequate to discharge the condition of planning. Consequently, these issues call into question the degree to which the CEMP can ensure that the negative environmental impacts of a project would be / are being minimised:

- Any shortcomings in the ES which fail to adequately identify impacts and therefore to propose appropriate mitigation need not be translated into the CEMP. The ES should be seen as the starting point, whereas the CEMP should be considered as a practical tool to manage impacts. Hence the regulator has the opportunity to ensure that issues raised as part of the ES development and the determination process can be addressed in more detail within the CEMP. However, this opportunity was not taken by the regulator and key issues, such as dewatering the excavation and understanding the risk posed by contaminated material within the made ground, have not been given appropriate consideration within the CEMP to ensure the environmental impact of the construction is minimised.
- The checklist for environmental impact assessments produced by P&E in July 2007 states that, “Should the Minister approve the application it should be on the condition that the developer submits a detailed Construction Environmental Action Plan”. The comments provided by P&E also state that the document should include particular considerations pertinent to the site in question that should be considered and action plans to ensure that these considerations are adhered to. The purpose of the document, as described by P&E in their comments, is to facilitate dialogue between enforcing authorities, contractors and all interested parties and set out clearly defined, accessible and understandable environmental standards and good practice methodologies for the construction phase. The CEMP lists environmental standards and good practice methodologies but does not apply the particular considerations pertinent to the site in question. P&E should have requested more detail on specifics to satisfy their own recommendations.
- The CEMP is clearly written as a prescriptive document for a contractor to implement and does not seek to be inclusive or cross cutting in order to facilitate a dialogue between all interested parties. There is no sense of

ownership by the applicant or their consultants. The emphasis of the document is clearly to pass the responsibility on to the contractor to deliver the appropriate environmental management on site. This is strongly at odds with recommended best practice and should have been identified as a concern by the regulator given their acknowledgement that the CEMP should facilitate dialogue between interested parties.

- The CEMP is primarily a generic document. Section J ‘Emissions to water’ does not include any specific references germane to the EfW Plant at La Collette and could be applied to a multitude of construction sites in a variety of locations. A range of documents are listed but these are not translated into site specific considerations of ‘how it should be done’ and ‘how can the action be verified’. The regulator should have specified more detail to ensure that impacts were minimised.
- Key to implementing the CEMP is the need to monitor and report on compliance, to update and modify documentation as appropriate and to keep records and routine reports of environmental performance. The CEMP clearly states that, “Minor amendments to the CEMP shall be made to a controlled copy by hand in red ink and dated”. Despite numerous requests to T&TS, as the project proponent, such a document has not been produced and the only document considered to represent the CEMP is the static document submitted with the reserved matters application. The detail included in this document is not sufficient to ensure that impacts on the environment can be minimised. Whilst other documents have been produced by the contractor since the submission of the CEMP to P&E these were not considered as part of the reserved matters submission and were not material considerations in discharging the condition of planning.
- The CEMP submitted to satisfy reserved matters should have been considered by the regulator as representing, at best, a ‘heads of terms’ document. The regulator should have requested that a more robust and site specific document be produced prior to discharging the planning condition in order to satisfy both best practice and their own concerns.

4.2.7 An inevitable result of a weak and generic CEMP is that the potential to protect the environment is reduced. The paucity of specific mitigation measures inherently introduces delays in responding to environmental incidents on the site. The approach becomes one of developing reactive solutions rather than taking a pro-active approach and having specific mitigation measures already fully considered and ready to implement or, better still, to implement mitigation before environmental impacts have the potential to occur.

4.2.8 Monitoring of the CEMP is essential to ensure that project proponents audit the implementation of measures and take stock of how successful the implementation of those measures has been in managing environmental impacts. In compliance with this, the CEMP states that a range of routine monitoring shall be carried out. This includes *inter alia*:

- Daily inspections of the site;
- The preparation and implementation of weekly audits;
- A daily record of observations kept in the site diary (which shall be made available immediately upon request by the Employer (T&TS)); and

- The CEMP should be updated and re-issued to the Employer for review at least every three months.
- 4.2.9 A robust and rigorous monitoring and recording protocol can add considerable value to the CEMP by identifying shortcomings in the plan. Common issues which are associated with implementing a CEMP include limits to contractual obligations, cost-effectiveness of mitigation measures, lack of guidance and poor communications and training.
- 4.2.10 As the project proponent, T&TS were requested to provide the relevant documentation in order to assess the robustness of the monitoring and reporting of the CEMP since construction commenced. The following key issues have been identified following a review of the documentation received:
- It is clear that the CEMP, as provided to discharge the planning condition, is not used as a tool for managing the impacts of the development during the post-consent process.
 - Site diaries have been provided for both the project manager (Babtie Fichtner) and the contractor (Camerons, as part of SBC Ltd). The appointed contractor, SBC Ltd, has produced numerous documents as part of their environmental management system (EMS). A range of reports relating to the EMS have also been provided including environmental risk assessments, tool box talks, remedial action (or risk assessment) method statements (RAMS), HSE reporting and auditing forms and site inspection forms.
 - The EMS reviews the ES in order to identify activities which have the potential to generate environmental impacts and the potential receptors of these impacts. An Environmental Impact Matrix was produced in the EMS that identified all possible interactions and provides a basis for identifying those site procedures which need to incorporate environmental elements, the environmental priorities and the relevant guidance available.
 - Based on the assessment made in the EMS, SBC were expected to deliver a range of environmental management interventions which are appropriate and proportionate, and which are likely to achieve the overarching objective of reducing environmental impacts during construction. Five mechanisms were identified to fulfil this obligation, namely: provision of specific facilities; site housekeeping; induction; method statements; and tool box talks.
 - The use of a methods statement is an established approach for managing environmental risks. The Environmental Impact Matrix highlighted that earthworks and excavation could potentially impact the adjacent marine environment. The EMS confirmed that prior to commencement of earthworks a method statement would be prepared in order to incorporate safe environmental working procedures.
 - Prior to commencing excavation works, the risk to the marine environment through the remobilisation of potentially contaminated material and the ingress of tidal water, was clearly recognised in the EMS. A range of mechanisms, including the production of a method statement, were identified in order to protect a sensitive receptor.
 - Excavation works started in late January 2009. However, concerns were raised by the project manager that RAMS for the excavation did not adequately

address the issue of groundwater ingress. In compliance with the EMS, excavation should not have commenced until this issue had been resolved.

- P&E discussed the issue of groundwater ingress and a possible discharge consent with the project manager on 3rd February 2009 and again on the 16th February 2009.
- On the 17th February excavation works were put on hold until a decision could be made on how construction could continue given the presence of sea water ingress. Excavations recommenced on the 2nd March at the north end of the culvert.
- On the 12th May 2009 SBC issued a final RAMS for groundwater removal and dewatering of the excavation for the main bunker hall tipping pit. Despite this issue being identified in the ES, and the associated concerns raised by P&E in the determination process, no appropriate method statement was produced prior to the excavation commencing. The time taken from the initial identification of the issue on site to the final production of the RAMS was approximately three months. During this period the project manager, the contractor, the applicant and the regulator were all aware of the issue. This is considered to represent a serious failure of process which has exposed the marine environment, and in particular a site of international importance, to unnecessary risks.
- In keeping with both best practice and the philosophy of the EMS to design and implement measures which are appropriate and proportionate, and which are likely to achieve the overarching objective of reducing environmental impacts during construction, the above situation should not have occurred.
- Whilst the magnitude of any impact on the marine environment remains unknown, the delay in implementing robust mitigation measures gives rise to genuine environmental concerns. There is a need to evaluate more fully the extent of any impact on the marine environment and the degree to which there has been a significant effect or a change in ecological character.
- Two residual issues also arise from the dewatering process that have the potential to generate environmental concerns. Firstly, the settled water has been taken to Bellozanne for treatment before being discharged to the marine environment. The process which has proposed this as a solution has not been sufficiently clear and transparent to facilitate dialogue among interested parties, as recommended by P&E, as to whether the treatment works can cope with the potentially contaminated water and that the subsequent discharge of this water has not also contributed to environmental degradation within St Aubin's Bay. Secondly, no information has been presented on the potential impact of the disposal of settled silt back into the excavation pit and whether this will generate an impact on the marine environment.

4.2.11 The presence of the adjacent ash mounds containing contaminated material was highlighted in the ES. This environmental issue was omitted from both the CEMP and not identified by the contractor in the EMS. Given that the construction of a trench was required for the route of an electric cable this issue should have been identified by both the project proponent and the regulator and information on how the environment was to be protected provided.

4.2.12 The absence of an appropriate action plan or working methodology to prevent remobilisation of buried ash and associated polluted water during construction demonstrates a failure in process and a lack of rigour on both the part of the project

proponent (T&TS), their contractors (Babtie Fichtner and SBC) and the regulator. The ash pits were a known source of contamination and an appropriate working method should have been established prior to excavation works commencing.

- 4.2.13 During excavation works on the 13th March 2009 water was noted entering the trench and ash-like material was observed. A week later P&E were informed of the incident. A remedial action method statement was produced on the 20th March 2009 and remedial action commenced on the 26th March.
- 4.2.14 It has been stated that the ultimate resolution of this incident was to the satisfaction of the regulator. This final resolution is not in question. However, what is apparent is the failure of the ES-CEMP-EMS process to produce a practical method for managing the potential environmental impacts of the development during the construction phase. Once again a failure to consider appropriate and proportionate responses in advance of works commencing has resulted in delays in implementing environmental protection. Additionally it is not clear whether there has been any lasting environmental impact associated with this incident.
- 4.2.15 T&TS have asserted that “the approach taken on the project throughout has been to avoid impact on the Ramsar Site.” This is indeed a laudable and creditable approach. However, the implementation of the CEMP and the working practices on site suggest that impacts have not been avoided. Based on the information provided as part of this review, there is evidence of a significant gap between aspiration and delivery. Construction activities have commenced on site in advance of appropriate mitigation measures being developed and implemented. Either the proponent should have ensured that these were in place prior to starting works or they should have ensured that works ceased until an appropriate resolution had been implemented. In this regard the involvement of the regulator should have also been more rigorous in ensuring that appropriate mitigation measures were in place prior to construction activities commencing.
- 4.2.16 In order to achieve appropriate protection of the environment it is necessary for the approach advocated by T&TS to be implemented fully for the remainder of the construction period and that greater rigour is applied to the design and implementation of mitigation measures with a more inclusive approach, as advocated by P&E, adopted.

4.3 Environmental concerns during operation

- 4.3.1 The main concerns regarding operational impacts on the environment relate to air quality and site drainage.
- 4.3.2 The air quality assessment in the ES is relatively robust and follows an accepted methodology. The ES predicts that the plant will operate within UK and European air quality objectives. In comparison with the existing plant at Bellozanne it is predicted that the operation of the new EfW Plant at La Collette will provide an overall net improvement in air quality.
- 4.3.3 Despite the predicted improvement in air quality it is essential that monitoring of air quality and the potential deposition of particulates within the adjacent marine

environment is undertaken. The establishment of a management plan for the Ramsar Site should seek to include reporting of air quality monitoring and associated evaluation of potential impacts of aerial deposition.

- 4.3.4 A condition of planning was the requirement to submit a schedule of foul and surface water drainage. This is to achieve compliance with policy WM3 of the Island Plan 2002 which ensures that the development will not have an unreasonable impact on neighbouring uses and the local environment by reason of noise, vibration, odour, leachates, water or gas emissions, including any effects on quality or quantity of water supply and drainage. Therefore the schedule of drainage should contain sufficient information to allow the regulator to ensure that there will be no unreasonable impact on the environment as a result of the operation of the EfW Plant.
- 4.3.5 The schedule of foul and surface water drainage was considered acceptable by P&E and signed off on the 29th October 2008. There were no further conditions attached, other than to comply with the submitted plans and therefore the document can be considered to be robust in the eyes of the regulator and appropriate to ensure no unreasonable environmental impacts on adjacent areas.
- 4.3.6 The drainage schedule indicates that during operation water will be discharged to three locations: foul sewer; cooling water culvert; and soakaway. The provisions for foul water and discharges to soakaways are considered adequate. However there are concerns regarding the discharges via the cooling water culvert.
- 4.3.7 The cooling water culvert currently discharges the existing power station cooling water via a consented discharge directly into the Ramsar Site. Three water sources are proposed for discharge to the cooling water culvert from the EfW Plant: cooling water from the steam turbine's water cooled condenser; excess rain water from the plant; and surface water run-off from external areas of hardstanding. The following concerns are identified regarding these arrangements:
- The information provided on all three water sources is very limited. Proposed discharge rates, volumes, and chemical and thermal characteristics are absent. No consideration is given to climate change and how rainfall intensity and totals will alter over time. Therefore the ability to assess whether the environment will be protected by the proposed drainage measures is limited.
 - Detail on the proposed thermal discharge is highly limited. No estimates of rates of discharge, dilution factors within the existing culvert or potential thermal regimes at the discharge point into the Ramsar Site are provided.
 - Rain water is to be collected from the plant for re-use. A 20m³ tank is proposed for rain water storage. Excess water (i.e. more than 20m³) will be discharged to the culvert. No volumetric values are provided for rainfall events (such as a 1 in 10 year return event) therefore the utility of the storage facility cannot be assessed. Similarly climate change induced variations in rainfall are not considered.
 - A simple estimate has been calculated based on information freely available on the Jersey Meteorological Department website (<http://www.jerseyweather.gov.je/>). The 1971-2000 period average total rainfall for the wettest month (December) is approximately 110mm. If this rainfall was distributed evenly over the month

this would equate to approximately to 3.5mm per 24 hours. The building surface area will be approximately 5,250m² (ES para. 7.2.1). Assuming that evaporation would be negligible and that there was no infiltration or other losses daily rainfall of 3.5mm would generate approximately 18.6m³ of rainwater run off. Therefore the storage volume would be utilised rapidly. Estimates of extreme rainfall events have been generated for Jersey⁶. A 1 in 10 year return period event has been estimated to generate approximately 51mm in 24 hours. Based on the assumptions described above this would generate approximately 267m³ of rainwater run off, greatly exceeding the 20m³ storage volume. Alternatively, the storage capacity would be reached in less than two hours for a 1 in 10 year rainfall event.

- No estimates are provided regarding potential contamination of roof surfaces from atmospheric deposition from the EfW Plant. This should have been at least considered.
- Surface water run off from areas of hardstanding is proposed to be discharged via a full retention separator (class 1) with a volume of 15m³ prior to discharge into the culvert. Again no volumetric values for rainfall events (such as a 1 in 10 year return event) or operational limitations relating to rainfall intensity are provided therefore the utility of the separator tank storage cannot be assessed. Similarly climate change induced variations in rainfall are not considered.
- An interceptor will only be effective against substances that are immiscible with and less dense than water, such as hydrocarbons. There is the potential for other contamination to occur but this has not been considered. This issue was raised by the regulator in the checklist for environmental impact assessments produced by P&E in July 2007. However, despite their concerns, the regulator considered the information provided in the reserved matters submission adequate to protect the environment from potential surface water pollution.

4.3.8 Whilst not foul or surface water drainage, and therefore strictly not the remit of the condition of planning, no details have been provided, beyond the generic statements in the ES, as to how process water will be managed in order to protect sensitive environmental receptors. The assumption is that this will be routed via discharge to foul sewer and be covered by a discharge consent. The regulator will need to ensure that this aspect is fully covered within the proposed Working Plan.

4.4 Conclusions and recommendations

4.4.1 This review has concluded that there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Site and adjacent land areas. Whilst there is no satisfaction in the following, the occurrence of environmental incidents during the construction phase of the project vindicates some of the issues raised in this report. The following are the key findings:

⁶ Harvey Rodda *pers. comm.* See also H. J. E. Rodda, M. A. Little, R. G. Wood, N. MacDougall, P. E. McSharry (2009). A digital archive of extreme rainfalls in the British Isles from 1866 to 1968 based on British Rainfall. *Weather* 64(3):71-75.

Key findings

- The CEMP provided in order to satisfy reserved matters is lacking in detail, based on generic rather than site specific solutions, has not generated a wider dialogue and fails to demonstrably address concerns raised by P&E.
- Key issues raised by P&E including the dewatering of the excavation and the potential for exposing and remobilising contaminated material have not been addressed. As these were considered worthy of comment, the regulator should have followed these issues up and requested additional information in order to ensure that the CEMP provided a robust basis to minimise the potential environmental effects during construction.
- By discharging the condition on the basis of the submitted CEMP, the regulator has exposed the environment, and the Ramsar Site in particular, to unnecessary risks.
- The monitoring and reporting protocols associated with managing environmental effects during construction appear to be weak and lack co-ordination. T&TS as the project proponent have relied on the contractor to implement their own environmental management system. The evidence provided indicates that there are weak lines of communication, poor record keeping and an arrogant or dismissive attitude to the need to provide evidence to substantiate claims that the approach taken on the project throughout has been to avoid impact on the Ramsar Site.
- Construction activities have commenced and continued on site without resolution of appropriate mitigation measures despite concerns raised by the Project Manager and in full knowledge of P&E. This is considered to be at odds with the ethos of the CEMP and the site EMS and not appropriate or rigorous practice.
- Prior to construction both the ingress of tidal water and the potential for the site to hold contaminated material was known. However, it took more than three months from the date that water ingress was first encountered within the excavation to the production of a detailed method statement. During this time the exchange of seawater continued between the excavation and the Ramsar Site. This is considered unacceptable practice which has unnecessarily exposed a sensitive environmental receptor to a potential pollution risk.
- The drainage schedule provides limited information. There are no quantified design values regarding chemical, thermal or volumetric issues. Therefore the suitability of the proposed measures cannot be evaluated. Issues raised by P&E, such as the suitability of interceptors to deal with other potential contaminants, have not been addressed in the submitted drainage schedule and these should have been followed up by the regulator.
- No consideration has been given to potential changes in run off resulting from climate change and how this may affect the proposed solutions.
- There is a genuine concern that the discharges via the cooling water culvert, unless adequately consented and monitored could result in environmental impacts.

- During the production of the ES, the discharging of reserved matters and throughout the construction phase of the project it is clear that T&TS expected the regulator to use their knowledge to define what were the likely environmental impacts and what was required to mitigate these. Similarly, P&E trusted the applicant to act responsibly and to know what issues there may be, particularly with regard to possible contamination, and to treat any issue in an appropriate manner. Whilst this is a laudable co-operative approach it has clearly failed to protect the environment and has resulted in on-going environmental concerns. It should have been the responsibility of T&TS to evaluate impacts and to propose appropriate mitigation and the role of P&E to ensure that this process was adequate and, where it was not, to guarantee that robust and proportionate measures were implemented to protect the environment. The relationship between the two Departments has compromised the independence of the regulator and the provision of appropriate environmental protection.
- The approach of P&E to discharging the planning conditions relating to the CEMP and the schedule of drainage lacked considerable rigor and failed to address their own concerns. Given shortcomings highlighted in the ES, the role of the reserved matters documentation in ensuring robust protection of the environment is heightened. However, the relaxed and complacent approach taken by P&E has compromised the protection of the environment and particularly the Ramsar Site.

4.4.2 The following recommendations are made to ensure that any genuine environmental concerns are minimised throughout the remainder of the construction phase and beyond into the operation of the EfW Plant:

Recommendations

- T&TS and P&E need to review all procedures, including *inter alia* method statements, monitoring and reporting, for implementing environmental mitigation and protection measures relevant for the remainder of the construction phase. This should not look to blame or accuse but should embrace the value espoused in the T&TS 2009 Business Plan of constantly looking for ways to improve and to be flexible and open to change.
- P&E should demonstrate a robust approach to consenting any discharges. Discharge consents should include quantifiable values wherever possible. Values should be set on what is adequate to achieve environmental protection not on what is achievable within the current design constraints.
- Beyond the EfW Plant project, future CEMPs should be more robust. It is recommended that P&E adopt the best practice guidance published by the Institute of Environmental Management and Assessment.
- The marine environment has been exposed to unnecessary risks during the construction phase of the project. What is unknown is the magnitude of any impacts. As part of developing a robust baseline data set for the Ramsar Site, P&E should investigate thoroughly both the sediments and appropriate biota in areas potentially affected by pollution. The results of these studies should be made public.

- The relationship between the two government departments should remain clear regarding future planning applications. T&TS, despite having a civic responsibility and an aim to minimise the impact of waste on the environment, should act as a responsible project proponent. P&E as the regulator and responsible planning authority should treat T&TS, as they would any other applicant, in a robust and rigorous manner in order to protect, maintain and enhance the natural environment.

5 CONSULTATION

5.1 Terms of reference

5.1.1 The following ToR is considered in this section:

To examine the consultation with stakeholders included in the planning process.

5.1.2 Consultation is a key component in the EIA process. It is implicit in Article 19 of the Planning and Building (Jersey) Law 2002 and is clearly expressed within Environmental Policy Advice Note 1 where it states “following extensive consultation with stakeholders, the EIA will be prepared”. The process of consultation should not be limited to statutory agencies or be seen as a one-way process. The public and non-statutory consultees should have the opportunity to comment on, and contribute to, the EIA process. Best practice advocated by the Institute of Environmental Management and Assessment recommends that consultation should be participative and start with the scoping process in order to consider the perspective of the affected community. However, there are various stages in the process where the opinions of stakeholders can be sought and integrated.

5.1.3 The need for public consultation is also highlighted in EC Directive 85/337/EEC as amended by EC Directive 97/11/EC which states, “Member States shall ensure that any request for development consent and any information gathered . . . are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.”

5.1.4 Furthermore, Resolution VIII.16 of the Ramsar Convention encourages Contracting Parties to ensure that impact assessment processes relating to wetlands are undertaken in a transparent and participatory manner which includes local stakeholders. This guidance extends to the States of Jersey.

5.2 Assessment of consultation

5.2.1 Several issues have been identified through the evaluation of the EIA process in Section 3 of this report which relate to the consultation philosophy and procedures.

5.2.2 The issues relating to consultation are discussed under the following key stages in the EIA process:

- Pre-scoping and scoping
- ES compilation and pre-determination
- Post determination and the Community Liaison Group

Pre-scoping and scoping

5.2.3 Section 3 of this report has already highlighted issues regarding consultation during the pre-scoping and scoping stage of the EIA process.

5.2.4 In summary, extensive consultation was held between T&TS and P&E but wider consultation at this stage was not reported within the ES. However, the absence of a summary within the ES does not mean that consultation was absent. It should be noted that prior to scoping the EIA there had been a long-term and on-going public consultation process regarding the Island's solid waste strategy. Within this context the proposition for an EfW Plant at La Collette was widely publicised so wider cognisance was already established. Press coverage was also significant so there would have been considerable awareness of the proposal.

5.2.5 During the scoping stage local NGOs were not formally approached by the applicant or did not engage pro-actively in the EIA process. The local NGOs have described a degree of resignation to the fact that the new EfW Plant at La Collette was a *fait accompli* and that any pro-active involvement at the scoping stage would have been unproductive. It would have been beneficial to the EIA process for the applicant to have engaged actively with the NGO sector at this stage in order to understand better local concerns and to garner wider information on the marine environment.

ES compilation and pre-determination

5.2.6 Two public consultation meetings were organised and run by the Environment and Public Services Committee in 2005 in order to explain proposals for the preferred location of the EfW Plant at La Collette.

5.2.7 The only specific public consultation undertaken by the applicant during the ES compilation was to assist with the health impact assessment (HIA). Standard techniques were used to evaluate the community's perception of the development and the potential impact on a range of issues. During the HIA questionnaires (Delphi Survey of the community) were sent to a proportion of the potentially affected population where their views were sought on the potential development of the EfW facility and the subsequent operation. The consultation processes employed were adequate for the purpose of the HIA.

5.2.8 The ES was circulated within P&E for comment. As stated in Section 3, the P&E internal review process was adequate to collate views from the variety of disciplines within the department. Where the process lacked rigour was the robustness with which these views manifested themselves in subsequent drafts of the ES and the failure of P&E to insist on additional information or clarification in order to satisfy their comments.

5.2.9 Upon submission the ES was made available for the public and circulated to a limited number of external consultees. There was a nine month period within which the public or NGOs could have commented on the ES. This is considered appropriate and in accordance with good practice.

5.2.10 P&E did not utilise their own "Environmental Who's Who in Jersey" document to assist either the applicant in sourcing or requesting information for consideration within the ES or for circulating the ES upon submission. In addition to the three NGOs (National Trust for Jersey, Société Jersiaise and Concern), several appropriate organisations should have been sent a formal request for comment. These include: Durrell Wildlife Conservation Trust, Marine Conservation Society and Save Our Shoreline.

5.2.11 Only the Société Jersiaise submitted a formal response. No other NGO submitted a written representation at this point. For whatever reason, such as an underlying cynicism, a consideration that the EfW Plant was a *fait accompli* or a concern regarding the release of sensitive ecological information into the public domain, by failing to submit formal comments individuals and NGOs effectively compromised their right to formally influence the determination process.

Post determination and the Community Liaison Group

5.2.12 Outline planning permission was granted on 26th October 2007. A programme of public consultation was required as a condition of the outline planning permission.

5.2.13 Specific meetings concerning reserved matters were held on the 9th and 12th October 2008. The objective of these meetings, as described in the outline permission, was to enable a fully informed decision to be made in accordance with Article 19 of the Planning and Building (Jersey) Law 2002. Article 19 considers the granting of planning permission and ensures that the Minister takes into account all material considerations in reaching a decision on planning matters. These meetings were advertised clearly and widely.

5.2.14 Public notices were also circulated regarding the proposal to establish a Community Liaison Group (CLG) in late 2007 and any local resident or business representative from the Parish of St Helier was invited to attend. The objective of the group was to ensure that any local issues were identified and properly addressed in respect of the development of the proposed EfW facility at La Collette.

5.2.15 The CLG met four times between January and October 2008. The Minister and senior members of staff from T&TS attended. The meetings were attended by up to eight local residents. The minutes demonstrate that the meetings provided an opportunity for T&TS to inform local residents about aspects of the proposed development and to record issues of public concern and the responses provided by T&TS or their representatives.

5.2.16 The process of public consultation was considered acceptable by P&E to discharge the planning condition.

5.2.17 Whilst the process was robust, two issues remain. Firstly, did the process provide additional information which was subsequently considered as part of the determination process to ensure that all material considerations were taken into account by the Minister; and secondly, was the emphasis of the meetings on listening to and gathering the views of the public, rather than promoting the project? The credibility of the process can be measured by its ability to affect decisions.

5.2.18 EIA best practice guidance recommends that public consultation should take several forms including public meetings, focus groups or workshops in order to be as participative and inclusive as possible. The mixture of public meetings and the CLG should have assisted this process. However, T&TS have indicated that the two sets of meetings served very different purposes with the CLG meetings not having a role to play in contributing to the ES. This was an opportunity missed. Furthermore, it was the assertion of T&TS that the CLG was established to keep residents from a particular area informed during the construction phase of the project and to create a

linkage between the residents and the project. If this was the intention there is no justification provided as to why the CLG never met again post discharging of reserved matters and has never met during the construction phase of the project.

- 5.2.19 There is no evidence of how any of the comments received from the public consultation meetings held in October 2008 were subsequently considered by P&E in discharging the condition and therefore assisting the Minister in making a decision. No formal minutes or report of the meetings have been provided. In addition, in a letter from the Minister for Transport and Technical Services dated 24th September 2008 he assured the Minister for Planning and Environment that the reserved matters were submitted to P&E on the 23rd September 2008 with completion of all matters conditioned within the Outline Permission. Given that the reserved matters consultation meetings had not been held at this point it is not clear how the outcomes of these meetings could have been included. One conclusion drawn is that the wording of the condition is such that for successful discharge the reserved matters submission should include a programme of public consultation rather than the actual outcomes of the consultation process. An alternative conclusion is that the public consultation process was considered simply as a regulatory hurdle that had to be overcome in order to discharge the reserved matters rather than a process by which environmental impacts could be identified and reduced.
- 5.2.20 Whilst not all the members of the group have been interviewed, two of the members have been critical of the CLG meetings suggesting that the approach taken to the liaison process was simply one of information provision rather than an opportunity to really take on board genuine concerns.

5.3 Conclusions and recommendations

- 5.3.1 An examination of the consultation with stakeholders included in the planning process has been undertaken. It has been clear throughout this review that the EIA process for the EfW Plant was, in the minds of non-statutory consultees, inextricably linked with the wider consultation on the Island's solid waste strategy. This has blurred the lines of engagement and potentially comprised the consultation process.
- 5.3.2 Interestingly, since works have commenced at La Collette and the initiation of this Scrutiny Review numerous representations have been made to various organisations, including the Scrutiny Office and the Ramsar Secretariat, by NGOs and members of the public. These have included detailed critiques of the ES. Had these representations been made during the nine months that the public consultation period was open then they would have represented material considerations within the planning decision-making process. Based on the evidence considered, possible explanations for why this information did not surface during the EIA process include *inter alia*: that a level of fatigue was present in both the public and NGOs resulting from the consultation regarding the solid waste strategy undermining public involvement in the EIA process; the view that the construction of an EfW Plant at La Collette was a *fait accompli* and therefore commenting would not make a material contribution to the final outcome; and that a deep seated cynicism existed regarding the ability of the regulator to influence the final outcome and to provide adequate protection of the marine environment. The advent of the Scrutiny process was

possibly seen as being independent of the planning process and therefore represented an opportunity to have an impartial examination of concerns even if the fundamental decision to grant planning permission could not be influenced.

5.3.3 The following specific conclusions are drawn regarding the consultation process:

Key findings

- NGOs and the wider public were not actively engaged during the pre-scoping/scoping stage of the project. In some quarters this perpetuated the attitude that the decision to grant planning permission was a *fait accompli* and that there was no realistic option available to influence the decision.
- The consultation process utilised during the HIA was adequate.
- The inter-departmental consultation process was adequate but the failure by P&E to ensure that their consultation responses were addressed appropriately remains a concern.
- P&E should have circulated the ES to a wider selection of NGOs. However, the NGO sector should have been more pro-active in its response. The failure of NGOs to provide relevant representations at the appropriate stage in the process has compromised their ability to influence the EIA process.
- T&TS should have endeavoured to utilise a range of fora for public consultation and should have adopted a more participative approach. There is an overriding suggestion that the public meetings were considered as a necessary planning hurdle rather than an opportunity to improve the quality of the EIA process. This is clearly manifest in the department's approach to the CLG and the abrupt termination of meetings following discharge of the reserved matters.
- There appears to be a strong mistrust of both the applicant and the regulator by members of the public and NGOs. This appears to extend to the independence of government departments and their technical ability to protect the marine environment.

5.3.4 With regard to consultation processes the following recommendations are made:

Recommendations

- There is a need to develop a culture of inclusivity, participation and empowerment in order to rebuild trust between NGOs, the wider public and the regulator regarding the EIA process.
- P&E should ensure that non-statutory consultees are routinely approached for opinion and input at the scoping stage of future EIAs. Recommendations on which key non-statutory consultees should be consulted should be provided by P&E to all applicants.
- The “Environmental Who’s Who” should be used as a matter of course in guiding public participation and consultation.
- Public consultation should follow best practice guidance, seek to use a variety of fora and be as participative and inclusive as possible.
- The public and NGOs should maintain involvement in the consultation process even when they may not be satisfied with the overall outcome. To disengage from the process is an abdication of responsibility.

- In keeping with their own terms of engagement, T&TS should re-establish the CLG. However, there is a legitimate concern that this may prove counterproductive.

6 OBLIGATIONS UNDER THE RAMSAR CONVENTION

6.1 Terms of reference

6.1.1 The following ToR is considered in this section:

To consider whether Jersey has fulfilled its international obligations under the Ramsar Convention.

6.2 The scope of the question posed

6.2.1 Section 3 of this report has highlighted several concerns regarding the ability of the ES to describe potential environmental effects and the over-reliance on unspecified post-determination mitigation measures. If the EIA process had been more robust and fully compliant with the relevant standards there would have been no need to notify Ramsar or Defra. However, the shortcomings identified potentially change this position.

6.2.2 Expectations defined under the Convention in respect of consultation and in respect of EIA are relevant and have been discussed in Section 5 of this report, but are not developed in this section since they constitute guidance rather than obligations. The principal issue here is “whether, and to what extent, due process under Article 3.2 of the Ramsar Convention on Wetlands has been followed”. The provisions of Article 3.2 are discussed below.

6.3 Caveat

6.3.1 Views expressed in this document are entirely independent of any views held by the Ramsar Convention Secretariat, and are similarly independent of any positions which may be taken in respect of the specific case by the Convention’s governing bodies (the Conference of Parties and the Standing Committee).

6.4 The status of “international obligations” in Jersey under the Ramsar Convention

6.4.1 There is much discussion in literature about the degree to which obligations accepted under Conventions like Ramsar may be “binding” or “hard” as opposed to “soft” law. These debates can tend to be subjective and not always helpful. In the present context it is correct to view the Articles of the Ramsar treaty itself as both “hard law” and binding; but it would not be useful to rehearse any great debate on this point, since it is understood to be no part of the States of Jersey’s position that they take a contrary view.

6.4.2 It is generally understood that there is a distinction in status between obligations expressed in Articles of the treaty text itself (which applies to the Article 3.2 issue discussed below) and expectations or exhortations agreed by the Parties in Resolutions of the Conference of Parties (which applies in the present case for

example to the issues of consultation and of EIA); with Convention Articles being “harder” or “more binding” than Resolutions. Even so, there is caselaw upholding Ramsar Resolutions as determinative too, in some circumstances^{7,8}.

- 6.4.3 In the absence of an “enforcement” mechanism in the Ramsar Convention, the accountability and assurance available to support the collective interests of the Contracting Parties as a whole, concerning the behaviour of any one of their number, is provided by reporting procedures, transparent meetings and advice mechanisms. Some of these are specified in the treaty text; others in Resolutions of the Conference of Parties (COP).
- 6.4.4 There is no formal process in the Convention for legalistic determination of “infringement” allegations at global level; although the COP can consider relevant information on such instances and can make recommendations, under Article 6.2. Naturally too, within their own jurisdictions, Parties and others may pursue such instances through domestic channels, by obtaining qualified legal advice in the national context and where appropriate by action in the national courts.
- 6.4.5 In some countries, provisions of international law are required to be regarded by the domestic courts as forming part of the domestic law, to the extent that those provisions are self-executing and are consistent with the domestic law. Further, courts in some jurisdictions are required to favour interpretations of their national legislation which are consistent with international law, against interpretations which would be inconsistent with it.
- 6.4.6 More generally, Article 31.1 of the Vienna Convention on the Law of Treaties provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
- 6.4.7 In Ramsar’s case, while consultation and EIA are governed by Resolutions, as mentioned above; Article 3.2 (concerning reporting of change or likely change to the ecological character of listed Ramsar sites, which is the principal focus of this section of the present review) is a strict and self-executing obligation in the treaty text itself. The specifics of what this Article entails are discussed below.

6.5 Reporting change/likely change affecting Ramsar sites: what is required under Article 3.2?

- 6.5.1 Article 3.2 of the Ramsar Convention provides that:

“each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological

⁷ Newton, E.C.2007. A Ramsar site wins its battle for conservation: annulment of decisions for building near Ramsar site on Bonaire was justified. Article published on Ramsar website, November 12 2007, at http://www.ramsar.org/wn/w.n.bonaire_2007.htm.

⁸ Verschuuren, J. 2008. Ramsar soft law is not soft at all: discussion of the 2007 decision by the Netherlands Crown on the Lac Ramsar site on the island of Bonaire. *Milieu en Recht*, Vol 35 No. 1, pp 28-34.

developments, pollution or other human interference. Information on such changes shall be passed without delay to the organisation or government responsible for the continuing bureau duties specified in Article 8 [ie the Ramsar Secretariat]”.

- 6.5.2 By contrast to some other provisions in the Convention, this is a strict and unqualified requirement. A key part of its force is that it envisages a “real time” or “as it happens” communication system, so that responses to specific issues can be prompt and effective. The concept is one of an action tool, rather than merely a documentation tool. The phrase “without delay” is critical to this (and yet it has unfortunately tended to be extremely poorly observed by most Parties).
- 6.5.3 A number of decisions have been adopted and guidance and information texts developed relating to the implementation of Article 3.2. These include the following:
- Resolution VIII.8 (2002): Assessing and reporting the status and trends of wetlands, and the implementation of Article 3.2 of the Convention;
 - Resolution IX.1 Annex A (2005): A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character;
 - Resolution XI.1 Annex E (2005): The Ramsar Integrated Framework for wetland inventory, assessment and monitoring (IF-WIAM);
 - Ramsar Handbook 15 (3rd edition, 2006): Addressing change in the ecological character of Ramsar sites and other wetlands;
 - Resolution IX.6: (2005): Guidance for addressing Ramsar sites or parts of sites which no longer meet the Criteria for designation;
 - Resolution X.15 (2008): Describing the ecological character of wetlands, and data needs and formats for core inventory: harmonized scientific and technical guidance;
 - Resolution X.16 (2008): A Framework for processes of detecting, reporting and responding to change in wetland ecological character;
 - Document COP10 Doc 27 (2008): Background and rationale to the Framework for processes of detecting, reporting and responding to change in wetland ecological character.
- 6.5.4 The importance of addressing change in wetland ecological character is related to the fact that under the Convention there is an objective of maintaining this character. The (revised) definition of “change in ecological character” is contained in paragraph 19 of Resolution IX.1 Annex A, and reads as follows: “For the purposes of implementation of Article 3.2, change in ecological character is the human-induced adverse alteration of any ecosystem component, process, and/or ecosystem benefit/service.”
- 6.5.5 The Convention text was far-sighted in requiring formal communication not only about those site changes that have happened or are happening, but also about those deemed “likely” to happen (thus representing a very early manifestation of the “precautionary approach”). This allows anticipatory/preventive action, which is often the most cost-effective option; and it is the basis for the Convention’s ability to offer dynamic systems for responding to issues of change in wetlands.
- 6.5.6 No guidance has been given, however, on what degree of “likelihood” or confidence is sufficient to require the triggering of the Article 3.2 process. Clearly it would

defeat the aim of the provision if strict standards of evidence and substantiation were imposed. On the other hand, the system might be open to abuse (or at least ineffectiveness) if the merest suggestion or anxiety on the part of one person were enough to create the legal reporting obligation. The appropriate attitude will lie somewhere in a middle ground of informed, authoritative or expert judgement, and judicious application of a precautionary approach. Options for the development of guidance on this issue are currently being examined by the Convention's Scientific & Technical Review Panel (STRP).

- 6.5.7 According to Document 27 from COP10 (referred to above), one implication of this is that planning and decision-making processes should be included within the scope of Ramsar site monitoring regimes. Paragraph 55 states: "In relation to Article 3.2, Contracting Parties will need to equip themselves with mechanisms to detect likely change as well as actual change. This may require processes for monitoring that go beyond monitoring of sites as such, to include also monitoring of planning and decision-making processes which may reveal a prospect or proposal of change, such as registers of consent applications for land-use/water-management change, development proposals, etc."
- 6.5.8 Article 3.2 is unqualified as to the magnitude or significance of the changes to which it refers. As written, it implies that any change, no matter how trivial, should be reported. Clearly to do so would be neither practical nor helpful. Further guidance on this has therefore been requested by the COP from the STRP, and is currently being considered.
- 6.5.9 One part of this issue concerns absolute triviality, and how to define the cut-off threshold between "*de minimis*" changes which can be ignored and other changes which may be indicating something real that requires a response. The other part concerns the ability to distinguish between (a) a natural range of variation and (b) some perturbation which becomes superimposed on this and signals an issue of concern.
- 6.5.10 It should be emphasised that what is concerned here is a question based on the ecological character and the functionality of the wetland; so triviality or significance is not something that will be judged simply in terms of the extent of the wetland area affected by change.
- 6.5.11 Both of the aspects described above approximate to a consideration of what is elsewhere sometimes referred to as "limits of acceptable change" or "alert limits". A strong linkage is suggested here with site management plans. The management plan should be the place where limits of acceptable change are defined, by reference to management objectives. In the most simplistic sense, anything that falls within the tolerance "bandwidth" for these objectives, if they are properly defined, should be "trivial" in the sense of not requiring an Article 3.2 report. Currently the South East Coast of Jersey Ramsar Site does not have a coherent management plan.
- 6.5.12 Ramsar's adopted management planning guidance (Resolution VIII.14) contains substantive advice on specifying limits, and describes them in the following terms: "Specified limits represent thresholds for action and should trigger an appropriate response. They define the degree to which the value of a performance indicator is permitted to fluctuate without creating any cause for concern. A sufficient safety

margin must always be allowed. Limits for ecological character features may be closely related to suitable use and carrying capacity limits. Thus, limits of human activities/interventions should also be clearly established and monitored.” Hence it is not simply ecological variables which are at stake, but also a characterisation of impact drivers.

- 6.5.13 Another source of guidance and methods concerning this issue is the ecological character description guidance published by the Government of Australia⁹. While not necessarily applicable to other Contracting Parties or to other situations elsewhere in the world, this does provide a recent example of thinking on the question of limits of acceptable change, and is also referred to in Ramsar COP10 Document 27.
- 6.5.14 No format has been prescribed for the reports to be submitted under Article 3.2. In practice they have taken a wide variety of forms. Legally the requirement is simply that information should be passed without delay. In principle this could be achieved by means of any kind of message from the relevant authority (acting on behalf of the Contracting Party) to the Convention Secretariat, provided that the communication is stated formally to be for the purposes of the Article. The emphasis is on triggering awareness and dialogue, rather than on in-depth analysis.
- 6.5.15 Consideration has however been given to achieving some measure of consistency in this, and providing prompts as to the kind of information which will give a minimum of necessary intelligence to allow the issues to be documented, understood and (if appropriate) acted upon. In Ramsar COP Resolution X.15 the Parties agreed a format of information fields for describing the ecological character of wetlands, and this has been designed in such a way that when completed as a baseline statement for any given Ramsar site, the section of the table which invites information on “change/likely change” can subsequently be completed in the event of change or likely change being detected, and the form itself with this information included can then simply be submitted to the Secretariat as the requisite report in fulfilment of Article 3.2. The Resolution “urges” and “invites” Parties to use it in this way, so while it is the recommended good practice, there is no mandatory requirement to follow this specific approach (although it is of course a mandatory requirement to “pass information” one way or another, “without delay”).
- 6.5.16 As well as the individual Article 3.2 reports that are provided immediately on each occasion, information on changes or likely changes in the ecological character of Ramsar sites is an important element of the periodic National Reports provided by Parties for each COP; and this was emphasised in Resolution VIII.8. The National Report Format for the most recent COP (COP10, report submission deadline 31 March 2008) contained the following question: “2.4.2: Have all cases of change or likely change in the ecological character of Ramsar sites been reported to the Ramsar Secretariat, pursuant to Article 3.2? If ‘yes’ or ‘for some sites’, please indicate in the ‘additional implementation’ information below for which Ramsar sites Article 3.2 reports have been made by the Administrative Authority to the

⁹ DEWHA. 2008. National framework and guidance for describing the ecological character of Australian Ramsar wetlands. Module 2 of the National Guidelines for Ramsar wetlands - Implementing the Ramsar Convention in Australia. Department of the Environment, Water, Heritage and the Arts, Commonwealth Government of Australia.

Secretariat, and for which sites such reports of change or likely change have not yet been made.”

- 6.5.17 Part of the purpose of this is to ensure that the COP has the opportunity to reflect collectively on relevant cases. In respect of individual Article 3.2 reports too, under Article 8.2 the Secretariat has the function of forwarding notification of “any alterations to the List, or changes in character of wetlands included therein, to all Contracting Parties and to arrange for these matters to be discussed at the next Conference”. Under Article 6.2 the COP is empowered to consider Article 3.2 information and to make “general or specific” recommendations to Parties, and the Secretariat in turn has a mandate (under Article 8.2) to “make known to the Contracting Party concerned, the recommendations of the Conferences in respect of such alterations to the List or of changes in the character of wetlands included therein.”
- 6.5.18 Clearly therefore, as well as Article 3.2 reports providing important tracking data on the status of Ramsar sites, and acting as a trigger for potential problem-solving assistance arranged through Ramsar channels (including the “Ramsar Advisory Mission” system), a further important purpose is for the COP to be able to safeguard its collective interest in observing equitable compliance with the Convention. This reflects the fact that although Parties retain exclusive sovereign rights over the Ramsar sites in their territory (Article 2.3), at the same time these sites are part of a global network, and the significance they represent is a shared concern of the global community of all Parties acting together.

6.6 Implementing Article 3.2 in Jersey: who is responsible?

- 6.6.1 The Bailiwick of Jersey, as a Crown Dependency of the United Kingdom, is internally self-governing, while the Crown has a permanent presence in the form of the Lieutenant Governor. The constitutional position of the Bailiwick is not enshrined in a formal constitutional document, but has instead evolved as the outcome of historical processes and accepted practice. On legal matters the Attorney General (a Crown appointee) advises both the Crown and the Island authorities.
- 6.6.2 Responsibility for defence matters and for the Island’s international representation at diplomatic level rests with the UK government. In this, the UK will not act internationally on behalf of Jersey without prior consultation; and similarly it always consults Jersey on its obligations under international agreements and other international law. Some non-diplomatic direct dealings by Jersey with foreign governments and intergovernmental bodies have been evolving in more recent years.
- 6.6.3 The UK therefore has overall responsibility for external relations concerning formal implementation of environmental Conventions in Jersey. It is nonetheless the responsibility of the Jersey authorities themselves to assure that Convention obligations are met internally. This means for example not being able to rely purely on the UK’s enactment of any necessary implementing legislation or policy measures (which of course would not extend to Jersey).
- 6.6.4 In the case of Ramsar, there is no automatic necessity for domestic legislation to give it effect; but for the Crown Dependencies and Overseas Territories covered by

the UK's ratification of the Convention in 1976, some basic assurances are required that each of them has some basically adequate legislative and/or policy and/or administrative measures in place to enable the major provisions of the Convention to be implemented.

- 6.6.5 It may also be worth noting that the UK's assessed financial contribution to the Ramsar Convention budget is looked after centrally by the UK authorities, and produces no financial consequences for the Dependencies and Territories. It is however for each Dependency/Territory to resource its own site protection, monitoring and other domestic costs of implementation.
- 6.6.6 The main channel of communication between the UK government and the three Crown Dependencies is provided by the UK Ministry of Justice. For day-to-day technical matters concerning the environment, however, liaison takes place directly with the Department of Environment, Food and Rural Affairs (Defra); and Defra's Wildlife, Habitats and Biodiversity Division takes the lead on Ramsar matters. The Ramsar Secretariat identifies Defra as the national "Administrative Authority" for the Convention in the UK, and there is a named individual in Wildlife, Habitats and Biodiversity Division as the "national focal point" or "daily contact" for communications with the Secretariat.
- 6.6.7 Article 3.2 requires that "Information on ... changes shall be passed without delay", without in fact specifying who is responsible for doing so. By clear implication however it is understood to be "[the] Contracting Party", which is referred to earlier in the Article as being the one responsible for arranging to become aware of the change or likely change. In line with other Ramsar practice this can be interpreted as equating to the Administrative Authority, ie in the present case, Defra on behalf of the States of Jersey.
- 6.6.8 On this construct, Defra technically could itself initiate moves towards an Article 3.2 report relating to a Ramsar site in Jersey, but (by domestic convention) only in consultation with the States. Technically also information can be received by the Ramsar Secretariat from anyone, including third parties, drawing attention to matters for which an Article 3.2 report should be recorded; but the Secretariat's first step in such cases is always to seek advice from the Administrative Authority. The Secretariat may also seek elucidation directly from others, which could include the States of Jersey; but it will always copy the Administrative Authority's national focal point into any such communications.
- 6.6.9 Normally therefore the most straightforward expectation would be that the body in the States of Jersey which has lead responsibility for Ramsar implementation matters, in this case P&E, having arranged to be informed of any change or likely change to any of the Island's Ramsar sites and on becoming aware of such an instance, would send details to Defra's Wildlife, Habitats and Biodiversity Division, who then on their joint behalf would submit appropriate details to the Ramsar Secretariat.
- 6.6.10 Ideally, "appropriate details" would consist at least of an ecological character description sheet with the "change/likely change?" section completed as described above. The absolute requirement for information to reach the Secretariat "without delay" needs special attention in the case of Crown Dependencies/Overseas

Territories, where there is an extra link in the communication chain to cater for. In due course appropriate information would also be incorporated into Defra's triennial national report to the COP, as described above.

6.7 What happened in this case?

- 6.7.1 The first key question here is determining whether and at what point an awareness arose on the part of the States of Jersey authorities of a "likely" change in the ecological character of the Jersey South-East Coast Ramsar Site.
- 6.7.2 The need for a residual waste treatment facility was identified in the Jersey Solid Waste Strategy adopted by the States of Jersey on 13 July 2005. Proposals in the Strategy included a new EfW Plant to replace the existing facility at Bellozanne. At the time, the Strategy acknowledged that Bellozanne itself was the most probable location for the new facility, but proposed that La Collette Phase 2 Reclamation would also be considered. Subsequently La Collette was confirmed as the preferred site, by the States at their meeting of 27 June 2006, subject to EIA and planning applications.
- 6.7.3 As part of a requirement in the EIA process to examine alternatives, a total of 10 sites were examined, and a comparative analysis again confirmed La Collette as the preferred choice.
- 6.7.4 Article 13 of the Planning and Buildings (Jersey) Law 2002 requires an EIA in two categories of circumstances: (a) where the Planning and Environment Committee considers that the proposed development "would be likely to have a significant effect on the environment of the Island or elsewhere"; and (b) where the proposed development is of a kind listed in Schedule 1 of the Planning and Building (Environmental Impact) (Jersey) Order 2006. The implied reason for (b) is that the kinds of development listed in the Schedule may be automatically deemed to be likely to have the kind of effect described for (a). The Order does not explicitly describe this in terms of likely "significant" effect (the relevance of highlighting this is explained below), but its provision for exemptions (Article 2(4)) refers to cases where the Minister considers a significant effect is not likely; so this is the logical reading.
- 6.7.5 One possible decision-point for concluding that a change in ecological character is likely in respect of a Ramsar site in Jersey could be the point where the Planning and Environment Committee confirms that an EIA is required for a given development on the grounds that it would be likely to have a significant environmental effect. (There would of course need to be a separate step in the logic relating this potential effect to the Ramsar Site). In the present case however this is not relevant, since the trigger for the EIA was instead the fact that Schedule 1 of the Order includes as item 11(4) "The construction of an installation for the disposal or treatment of waste". In other words no specific judgement needed to be made, at the point of initiating the EIA, as to the significance or otherwise of its likely effects.
- 6.7.6 The next potential decision-point would have been the receipt of the ES, which was submitted with an application for outline planning consent in January 2007. Irrespective of subsequent shortcomings highlighted in Section 3 of this report, it is

necessary to examine whether the ES identified potential effects constituting a likely change in ecological character of the Ramsar Site (on a precautionary basis, as discussed earlier in the present section). Relevant passages in the ES text are as follows:

- From Section 4.6.5:
 - “Cooling water from the boilers would be discharged to sea via the existing outfall to the east of the power station which discharges into the RAMSAR (sic) site. The outfall would continue to operate under existing discharge conditions which have been previously assessed as having no significant adverse impact on the marine environment.”
- From Section 10.2:
 - “Marine habitats, including tidal areas within the breakwater, would not be directly affected by any development on site.”
- From Section 10.3.2:
 - “There would be no direct loss of habitat designated as RAMSAR (sic) site. The only potential impact on the RAMSAR (sic) site would be water pollution risk from the construction and operation of the new facility. There is a potential for impact from the discharge of cooling water from the boiler to the sea and subsequently having an impact on the RAMSAR (sic) site by changing temperature gradients near to the outfall and therefore affecting the composition of species in the shoreline habitat. The proposed facility would have no direct thermal discharge to water. However, steam would be sent to the Jersey Electricity Company power station where it would be passed through a steam turbine and condensed. The condenser would use the existing power station sea water cooling system, which circulates water through the system to an existing consented outfall into the sea to the east of La Collette. As much of the power station equipment is now not used, additional load from the Energy from Waste facility cooling system would not exceed previous thermal loading from the existing power station and therefore the new facility would not have a significant impact and would operate within the conditions of the existing consent.”
- From Section 10.3.3:
 - “Water pollution risk to the RAMSAR (sic) site would be mitigated through controls on construction placed on the Contractor and design measures designed to separate and collect and dispose potentially polluted leachate and site drainage.”
- From Section 16.3:
 - “The main receptor is the coastal waters which are designated as the South East Coast of Jersey RAMSAR (sic) Site, due to its high ecological value and diversity of habitats. This RAMSAR (sic) site would potentially be vulnerable should pollutants be released during construction or operation of the site. The design of the facility would aim to break the links between sources of pollution during construction and operation and the receptor which is the coastal RAMSAR (sic) site.”

6.7.7 It is not the purpose of this Section to comment on whether these are fair or accurate statements, this is dealt with elsewhere in this report. If correct, they express at least vulnerabilities, if not probable impacts; and the fact that mitigation measures are

cited in response to these vulnerabilities might suggest that this constitutes recognition of potential impacts on the Ramsar Site.

- 6.7.8 It is notable also that some of the statements cited above refer to “direct” effects and “significant” effects; while the test to be met for triggering an Article 3.2 report involves neither of these qualifiers, turning instead simply on awareness of change or likely change.
- 6.7.9 Concerning “significance”, this is addressed above in the discussion of alert limits and tolerance thresholds, where it was suggested that these might be defined in a Ramsar Site management plan. No such plan is however in existence for the Jersey South-East Coast site and no such thresholds have been defined for it: hence in principle a “likely change” of any magnitude at this site could legitimately require an Article 3.2 report.
- 6.7.10 The further judgement requiring to be made concerns the perceived degree of “likelihood” of a potential change (this is also covered in the discussion of Convention requirements above, in the context of taking a precautionary approach); but no particular light is shed on this by the statements in the ES.
- 6.7.11 It could of course be argued that “likelihood of change” does not arise at proposal stage, but only when a consent to go ahead with the development is in effect. Planning consent in the present case was granted on 29 October 2008.
- 6.7.12 The statements reported above are those of the relevant contractors and Departments. Opinions on the same matters have been put to the authorities by consultees, elected representatives and NGOs; and these also need to be taken into account by the authorities in their consideration of whether a report under Ramsar Article 3.2 is appropriate. For example, Wetlands International has stated that “the siting of the incinerator is just meters from the Ramsar Site and its probable pollution - both airborne and waterborne - gives great concern to many environmentalists and other organisations not just locally but internationally”¹⁰. Among others, the Jersey campaign group Save Our Shoreline have also made submissions alleging that the ES overlooks certain types of potential impact on the Ramsar Site (such as deposition of air pollutants), and underplays others¹¹.
- 6.7.13 It is common ground that no report stated to be for the purposes of Ramsar Article 3.2 has been submitted to the Ramsar Secretariat by the UK in respect of this case. In fact the States of Jersey have made it clear that they have applied themselves to this question (ie have not ignored it) and have come to the view that such a report was not required.
- 6.7.14 A letter explaining this was sent by the Director of Environment to the designated focal point in Defra (the UK’s Ramsar Administrative Authority) on 13 February 2009, stating that “Because the EIA process did not identify any adverse impacts to the ecology of the Ramsar Site, it was concluded that no notification was necessary under Article 3.2 of the Convention”. The letter summarises some assurances about

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<http://www.wetlands.org/Aboutwetlandareas/Threatenedwetlandsites/WasteIncineratoronIsleofJersey/tabid/1489/Default.aspx>

¹¹ <http://www.axiomci.com/sos/releaseapril.pdf>

safeguards being applied, and refers to significance of effect as part of the basis for the opinion about Article 3.2, for example that warm water discharge “will not cause any significant change to the ecology of the Ramsar Site”. The Director of Environment’s letter has been copied both to the Ramsar Secretariat and to the Jersey Environment Scrutiny Panel.

- 6.7.15 For completeness it may be noted also that no reference to the issue was made in the National Report from the UK to the 10th meeting of the Ramsar COP in 2008. Such reports are compiled by Defra in consultation with the Crown Dependencies and Overseas Territories, and the one for COP10 was submitted to the Ramsar Secretariat on 25 April 2008 (ie after outline planning permission for the EfW Plant was in place). In response to the report format question about cases of change or likely change in the ecological character of Ramsar sites (see above), the UK answered simply “No additional cases have been identified since COP9” (COP9 was in 2005).

6.8 Summary

- 6.8.1 It is clear that the relevant States of Jersey authorities (and, to an extent, their environmental contractors) have been well aware of the existence of the designated Ramsar site adjacent to the development site, and of the fact that Jersey is subject to obligations flowing from the Bailiwick’s inclusion in the UK ratification of the Convention, which dates back to 1976.
- 6.8.2 It is further clear that lines of communication have been in place between the States of Jersey and the Ramsar Administrative Authority for the UK (Defra) concerning Ramsar implementation issues in the Island. Communications with the Ramsar Secretariat have also been able to occur. Field access to the Ramsar Site, and generation of information both on ecological conditions and on land-use planning activities, appear to pose no insuperable difficulties. NGOs, citizens, elected representatives, interested party consultees and professional advisers all have a voice, to a greater or lesser degree.
- 6.8.3 The first part of Article 3.2 therefore, which requires the Jersey authorities and the UK government, acting together, to “arrange to be informed at the earliest possible time if the ecological character of any [Ramsar site in the UK or Crown Dependencies/Overseas Territories] has changed, is changing or is likely to change” appears in principle to be being implemented, at least to some degree. The quality and extent of its implementation is not discussed here, since evidence on this has not been assessed, and it is not in general terms materially disputed between any of the stakeholders concerned with the Scrutiny Panel’s review.
- 6.8.4 More at issue is the second part of the Article, which requires that “information on such [actual or likely] changes shall be passed without delay to the [Ramsar Secretariat]”. The States’ position, to which Defra has apparently not added any comment, is that no information requires to be passed in this case because no change of the kind described in the Article exists. It is the conclusion of the present review that this position may be unsound, on the following (non-exhaustive) grounds:

- There is evidence that, to some extent at least, the States have relied on a test of significance of likely change, whereas the requirement in Article 3.2 is unqualified by any such test;
- One acceptable method of defining reasonable *de minimis* limits to the unqualified requirement in Article 3.2, namely specification of tolerance thresholds in a Ramsar site management plan, has not been used, since no management plan is in place for the South East Coast of Jersey Ramsar Site, and no such thresholds have been defined. Additionally the ES did not address the specifics of the Ramsar Site, its qualifying features of interest or the ecosystem services it provides;
- The States, in forming their view, appear to have relied only on the information in the ES, whereas additional information submitted to them (eg from third parties) reflects a different view about the likelihood of change in the ecological character of the Ramsar Site, and creates at least the possibility of such a change: the spirit of Article 3.2 is precautionary, so where there is doubt or a difference of view, the wise course is for the Contracting Party concerned (in this case Defra at the instigation of the States of Jersey) to err on the side of caution and to submit a report (this conclusion of course assumes even greater force as there is evidence presented in this report that the ES itself is deficient);
- There also appears to have been considerable reliance on mitigation measures to give assurance about the security of the Ramsar Site, and it could be argued that this in itself suggests that there is a likelihood of change against which to be safeguarded, and hence that an Article 3.2 report should have been submitted.

6.8.5 If the Jersey authorities and/or Defra had accepted that a change in ecological character was likely in the sense of Article 3.2, there might have been a further issue to examine here in relation to the element of the Article which requires information to be passed “without delay”, since the question of implementation of the Article appears to have been addressed, in the main, when the planning and consenting process was already well advanced, rather than when the prospect of change might first have been appreciated. Since the position of the authorities has been that no such change was in prospect, it is not necessary to examine this aspect further here; but it is noted for the record.

6.8.6 In summary, the ES (eg by its reference to mitigation measures), the submissions from third parties (eg about pollution impacts) and the issues identified as part of this review suggest that change in the ecological character of the South East Coast of Jersey Ramsar Site as a result of developing the La Collette EfW Plant is at least possible. Whether it is “likely” in the terms of Article 3.2 of the Ramsar Convention is more arguable, not least because the interpretation of that term in the Convention is not settled. The course of action most consistent with the overall precautionary intent of the Article however, given these uncertainties, would have been for the States of Jersey, through the responsible UK Department (Defra), to pass information on the scope for change in the ecological character of the Ramsar Site to the Ramsar Secretariat, by means of an Article 3.2 report.

6.8.7 Since they did not do so, it is considered that they did not fulfil the spirit of their obligations under the Convention in this respect.

6.8.8 It may be noted that Article 3.2 revolves around the passing of information. It implies nothing in itself about action which may or may not follow from the passing of such information. It may frequently arise that the information allows a common appreciation of issues at stake in a case involving a Ramsar site, and provides a basis for a common appreciation about assurances and solutions which represent satisfactory outcomes, with or without additional action. It is an obligation, but is a constructive and non-threatening one in that sense.

6.9 Additional observations

6.9.1 This review has highlighted possible shortcomings regarding the implementation of the obligations under the Convention. A report produced by P&E in February 2003 emphasised the shortfall in funding required to implement fully the States' obligations under multi-lateral environmental agreements (MEAs) including the Ramsar Convention. This report was submitted as part of the fundamental spending review and was rejected by the States at the time.

6.9.2 There is acknowledgement within P&E that whilst they are getting closer to receiving the resources they require to implement all their obligations under MEAs they still fall short. However, they have in place a strategic plan to meet all the relevant international obligations by 2010.

6.10 Conclusions and recommendations

6.10.1 The question posed within the ToR was to consider whether Jersey has fulfilled its international obligations under the Ramsar Convention. Whilst it is acknowledged that there is debate as to which obligations under the Ramsar Convention may be binding or hard as opposed to soft law, Article 3.2 is a strict and self-executing obligation enshrined in the treaty text itself. The trigger for Article 3.2 reporting is the identification of change or likely change in ecological character. The key findings relating to Article 3.2 reporting are summarised below:

Key findings – Article 3.2 reporting

- T&TS have stated that the ES was predicated on avoiding impacts to the Ramsar Site. However, the ES still highlights numerous potential effects which could constitute a likely change in ecological character. Despite the lack of detail regarding the assessment of significant environmental effects and the subsequent relevant mitigation measures the regulator was satisfied that the ES and wider EIA process was robust enough to ensure that there would be no change in ecological character within the Ramsar Site. Therefore P&E have considered it unnecessary to submit an Article 3.2 report, either directly to the Ramsar Secretariat or via Defra.
- Despite recorded construction-related environmental incidents P&E have maintained this position and no Article 3.2 report has been submitted.

- The key issue is when should an Article 3.2 report be submitted? If the regulator is of the opinion that the ES and the subsequent post-determination mitigation measures and implementation of the CEMP are suitably robust in order to protect the environment then there should be no need to expect a likely change in ecological character, and hence no need for an Article 3.2 report.
- However, the findings of this review consider the ES to potentially be unsound, the mitigation measures inappropriate and poorly considered and the implementation of the CEMP lacking in rigour. This has resulted in potential pollution of the marine environment. The magnitude of this pollution is not a consideration under Article 3.2. Therefore there is a strong case to argue that an Article 3.2 report should be submitted.
- Failure to submit an Article 3.2 report and to ensure full protection of the Ramsar Site throughout the pre and post-determination process is a failure to meet the obligations under the Ramsar Convention.

6.10.2 In addition to the Article 3.2 issues, the following additional concerns regarding the obligations under the Ramsar Convention have been identified:

Key findings – wider obligations under the Ramsar Convention

- All Ramsar sites should have a management plan. The absence of a management plan for the Ramsar Site makes assessment of significant environmental effects and change in ecological character more difficult.
- The resources required to enable proper implementation of the Convention have not been forthcoming in the past. Whilst there is a strategic plan in place there does not appear to be a firm financial commitment to provide both the one-off and recurrent costs required to implement the Convention fully.
- Recent studies have indicated that there has been a reduction in environmental quality over the last decade in the portion of the Ramsar Site closest to La Collette. There is evidence that this is the combined result of a decrease in water quality (from point and diffuse discharges), reduced flushing rates due to structural changes and direct human recreational activity. Consequently, these factors alone (without the EfW development) suggest that an Article 3.2 report should have been submitted and an entry should have been made on the National Report from the UK to COP10.
- Additional studies are required to assess the current status of the Ramsar Site. This work should focus on providing information which will support the development and subsequent implementation of a site management plan. Whilst the studies can draw upon wider information that may be available, they should be conducted as an independent stand alone study and not form part of planning application or other purpose.
- The development of the management plan is not an end in itself. It is essential that the information provided within the management plan is kept live and updated and that it is utilised to assess any likely environmental effects and potential changes in ecological character.

- Change in ecological character brings with it socio-economic aspects regarding alteration to any ecosystem benefit/service. There is evidence that the marine fishery, and especially the shell fishery, within the Ramsar Site is degrading over time due to water quality issues. The reduction in the quality and value of this fishery represents a negative impact on a key ecosystem service. This in turn represents a change in ecological character. This, and other ecosystem services such as recreation, needs to be considered fully in the site management plan.

6.10.3 The following recommendations are made:

Recommendations

- It is recommended that this report is submitted to both Defra and the Ramsar Secretariat in order to seek their views on the conclusions drawn.
- P&E should continue their on-going efforts to develop a management plan for the South East Coast of Jersey Ramsar Site, as well as all the States' Ramsar sites.
- P&E should be awarded sufficient funding to enable adequate implementation of the Ramsar Convention.
- The development of the management plan must give careful consideration to monitoring and assessment protocols. Physico-chemical sampling and biotic monitoring should be appropriate, stratified and fit for purpose in order to evaluate ecological character. The evaluation of ecological character needs to also take into account wider ecosystem services provided by the Ramsar Site.
- That an Article 3.2 report is produced and submitted to the Ramsar Secretariat regarding the likely change in ecological character within the South East Coast of Jersey Ramsar Site as a result of potential water vectored contamination. This report should also highlight the activities proposed to assess and understand this situation and to ensure appropriate protection and, if necessary, remediation is established.

7 ANCILLARY MATTERS

7.1 Terms of reference

7.1.1 The following ToR are considered in this section:

Any other pertinent matters that may arise during the course of the review.

7.1.2 The review process has provided a considerable insight into environmental standards and regulation within the States of Jersey. It has also garnered a broad understanding of the South East Coast of Jersey Ramsar Site.

7.2 Summary of matters

7.2.1 The following are key matters which warrant further consideration and to which the attention of the States should focus. They are not described in detail here but serve to highlight a range of issues which need to be considered by the appropriate bodies or individuals.

- Evidence assessed as part of this review indicates that there are on-going potential impacts on the marine environment in the vicinity of La Collette. Impacts may currently result from changes in water quality, the presence of invasive species, the intensity of recreation use and the altered tidal flushing regime resulting from the reclamation activities. Further investigations are required to evaluate these impacts and to propose appropriate mitigation and/or remediation.
- The boundaries of the Island's existing Ramsar sites need to be protected and incursion into the sites, for whatever reason, unless in its urgent national interest, should not be allowed.
- There is evidence of chronic marine pollution, and especially elevated levels of arsenic. This is recognised by P&E and whilst they are working towards a resolution of this matter it is essential that the impacts of this on the Ramsar Site are clearly understood.
- Progressive development is on-going along the coast of St Helier. The cumulative impacts on the marine environment, and the Ramsar Site in particular, associated with the waterfront development need to be given careful consideration.
- The ecological character of the Island's Ramsar sites extends to the ecosystem services and the benefits the States gain from the natural environment. An excellent example of this is the oyster *Crassostrea gigas* fishery which matches the size of the industry for the whole of the UK and Northern Ireland. These essential ecosystem services need to be better understood, protected and where possible enhanced.
- There is evidence that discharges to the marine environment may be impacting on the sea fishery, ultimately compromising the provision of ecosystem services. Specific issues relating to heavy metal accumulation and *Escherichia coli* need to be better understood in order to protect this vital resource.
- Associated with this is the need to understand the source of any pollution. This review has identified a range of potential sources including the existing ash pits,

the made ground within the reclamation area, the existing outfall from Bellozanne and a range of smaller piped and diffuse discharges along the coast. There may also be other sources which were not identified as part of this review.

- There is a need for the environmental regulator to build trust and to reduce the degree of suspicion which exists in some parties. There are some excellent examples of co-operative working between P&E and citizens. These need to be built on in a participative and empowering way.

7.2.2 The Scrutiny Review process is an essential mechanism to facilitate open government and to call the executive to account for its policies and decisions. However the following two observations are made regarding the process in relation to this review:

- There is a suggestion of obfuscation by T&TS and an unwillingness to be proactive in providing information unless it was formally requested and identified in a precise form. This was especially the case in trying to identify the on-going environmental management and mitigation procedures in operation at La Collette. This has delayed the review process and potentially compromised some of the conclusions.
- Due to circumstances outside of the control of the Review, key personnel within P&E did not participate fully in the process or were not available to attend public hearings. Given that these individuals held positions with either direct responsibility for or knowledge of the South East Coast of Jersey Ramsar Site this is considered a significant omission from the process.

7.2.3 It is essential that moving forwards beyond this review the States adopt a precautionary approach in relation to the protection of Jersey's unique environment and that the lessons learnt as a result of this review are considered and acted upon.

8 CONCLUDING REMARKS

8.1 Background

- 8.1.1 The protection of the natural environment should not be considered as altruistic or a luxury. The Millennium Ecosystem Assessment clearly demonstrated the link between ecosystem change and human well-being¹². The UK government has recognised this and translated it into a vision to secure a diverse, healthy and resilient natural environment, which provides the basis for everyone's well-being, health and prosperity now and in the future; and where the value of the services provided by the natural environment are reflected in decision-making¹³.
- 8.1.2 The link between the need to protect the environment and to improve human well-being is recognised in the 2009 Business Plan for P&E which states: “the Planning and Environment Department works to protect and enhance our beautiful and unique Island, whilst ensuring we maintain both a thriving community and economy”.
- 8.1.3 This interdependence of humans with their environment is also enshrined in the text of the Ramsar Convention. Similarly the wise use of wetlands within this context is a fundamental tenet of the Ramsar Convention.
- 8.1.4 Whilst often considered as obvious statements it is essential that these linkages are made across Government departments. There is a fundamental need to recognise that the protection of the natural environment is intrinsically linked with the wider socio-economic interests of the Island.

8.2 The Review

- 8.2.1 This review has not sought to re-open the debate regarding the need for an EfW Plant or whether La Collette was the appropriate location. Similarly the review has not considered whether ultimately the decision to grant planning permission was the correct one or not. The focus of the review has been process. However, where failures in process have been identified it is possible that the ability of the Minister to assess all material considerations and consequently to make a sound decision may have been compromised.
- 8.2.2 Additionally the objective of this review has not been to blame individuals but evaluate any procedural or institutional limitations which may have undermined the protection of Jersey's natural environment and the South East Coast Ramsar Site in particular. There is evidence that the relationship between the two government departments has contributed to a lack of clarity and transparency in decision-making. This has also resulted in an abdication of responsibility and complacent approach to environmental protection. Despite their mutual attendant duties of care for the natural environment there also does not appear to have been a judicious application of a precautionary approach to the protection of the environment.

¹² <http://www.millenniumassessment.org/en/index.aspx>

¹³ PSA Delivery Agreement 28: Secure a healthy natural environment for today and the future http://www.hm-treasury.gov.uk/d/pbr_csr07_psa28.pdf

- 8.2.3 Whilst sound procedural changes are recognised by P&E, and many are underway, it is essential that a more robust, transparent and accountable approach to environmental regulation is adopted in order to protect Jersey's unique natural heritage.

APPENDIX 1: PLANNING CASE LAW

Assessment of significance

A review of the EIA in the planning system in Scotland has concluded that the assessment of significance can be the most problematic element of an EIA¹⁴. Much of this appendix draws on case law presented in the review conducted on behalf of the Scottish Executive.

Whilst the assessment of significance is fundamentally a matter for the competent authority to address, the compliance with the requirements of the EIA Directive will not have been achieved if the public do not have an opportunity to participate in considering the environmental effects. Whilst local subtleties will apply within the States of Jersey, the Planning & Building (Environmental Impact) Jersey Order 2006 is predicated on the EIA Directive and the States have agreed with the recommendation that the way forward was to adopt in principle the approach prescribed by the Directive.

Where a competent authority has identified a likely significant environmental effect then it cannot determine the development consents until it has ‘full knowledge’ of that effect. This point was considered in the UK in *R v Cornwall County Council ex parte Hardy*¹⁵ where the competent authority had resolved to grant planning permission subject to a condition that no development shall take place until additional surveys had been undertaken and mitigation measures proposed in relation to a protected species of bat. This was found to be an unlawful resolution and the planning permission was quashed. Harrison J stated that if the nature conservation aspects concerned did not involve ‘significant adverse effects’ then there would be no requirement for the ES to contain the measures envisaged to deal with them and no duty on the planning authority to consider those measures before granting planning permission. Further, if the nature conservation aspect did not amount to a ‘main effect’ there would be no requirement for the ES to contain data to assess them and no duty on the planning authorities to consider that data before granting planning permission.

In the *Hardy* case the Court was considering whether the planning authority could have concluded that there were significant adverse effects. Although the ES had concluded that there would be no significant adverse environmental effects, and this was endorsed by the Director of Planning, a statutory agency and a NGO both had advised that further investigations were required to ensure protection of a protected species. Thus, where this is the case the ES must provide sufficient information to enable the regulator (P&E), consultees and members of the public to consider those effects.

In *Maureen Smith v Secretary of State for the Environment, Transport and the Regions*¹⁶ the Court of Appeal held that it was possible to leave the finer details of certain schemes to be clarified by virtue of a condition and it was permissible, where

¹⁴ Scottish Executive (2006) *The use of Environmental Impact Assessment in the Planning System and Electricity Applications*. Scottish Executive Social Research, Edinburgh, UK.

¹⁵ *R v Cornwall County Council ex parte Hardy* (2001) EnvLR, 473.

¹⁶ *Maureen Smith v Secretary of State for the Environment, Transport and the Regions* (2003) EWCA Civ, 262.

consideration was being given to the impact on the environment of a planning decision, for the decision-maker to contemplate the likely decisions that others (in that case the Environment Agency) would take in relation to details where those others had the interests of the environment as one of their objectives.

Whilst the cases make clear the need to ensure that the competent authority has before it sufficient information to assess the likely significant effects of the development, it is clear that the EIA legislation does not envisage the production of ESs to be so detailed that information is presented on every conceivable aspect. Housen J referred to the requirement that a competent authority has ‘*full knowledge of the project’s likely significant effects on the environment*’.

He stated: ‘*That is not to suggest that full knowledge requires an environmental information statement to contain every conceivable scrap of environmental information about a particular project. The Directive Assessment Regulations require likely significant effects to be assessed. It will be for the local Planning Authority to decide whether a particular effect is significant, but the decision to defer a description of a likely significant adverse effect on any measures to avoid or reduce or remedy it to a later stage would not be in accordance with the terms in Schedule 3, would conflict with the public’s right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive*’

Several cases, including the two described above, were reviewed by Sullivan J in *R (on the application of Blewett) v Derbyshire County Council*¹⁷ where the Claimants asserted that the ES accompanying the planning application had not included an assessment of the potential impact of a proposed landfill on groundwater. Sullivan J approved the leaving over of the assessment of the lining system of the cell design to the Pollution Prevention and Control authorisation process. Sullivan J remarked that the requirement for an EIA to be undertaken was not intended to obstruct development but to ensure that developments that may affect the environment were made on the basis of full information, although the Regulations were not based on an unrealistic expectation that the ES would always contain ‘the full information’.

The consultation process and publicity requirement could result in identification of any deficiencies so that the planning authority had as full a picture as possible. Sullivan J said ‘there will be cases where the document purporting to be an ES is so deficient that it could not reasonably be described as an ES as defined by the Regulations, but they are likely to be few and far between’.

Blewett was followed by *R (on the application of Kent) v First Secretary of State and Others*¹⁸ regarding a challenge by a local resident to the grant of planning permission for the disposal of hazardous waste in rock salt caverns. The Claimant asserted that it was not permissible to rely on pollution prevention and control permit application procedures to handle detailed material that should be available as part of the EIA process. Accordingly, the failure of the ES to identify specific waste types, relying instead on generic descriptions, caused the ES to be fundamentally flawed. Harrison J noted that the case law showed that ‘*whilst the ES must contain*

¹⁷ *R (on the application of Blewett) v Derbyshire County Council*. (2004) Emv LR, 569.

¹⁸ *R (on the application of Kent) v First Secretary of State and Others*. (2004) EWHC 2953 (Admin).

sufficient information to enable the decision maker to make an informed judgement as to whether the development is likely to have a significant effect on the environment, it is for the decision maker to decide whether the information contained in the document is sufficient to meet the definition of an ES in regulation 2 of the EIA Regulations, subject only to review on Wednesbury [unreasonableness] grounds whilst also bearing in mind that the document does not have to contain information about all the effects, only the ‘main effects’ or the ‘likely significant effects’.

The *Kent* case is the first opportunity for the UK courts to directly explore the relationship between EIA and pollution prevention and control permitting. Harrison J accepted that the pollution prevention and control process cannot be used to convert an unlawful ES into a lawful one.